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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Directory of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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July 28, 1997

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Office of the Comptroller of the Currency ("OCC") Final Decision and Order (hereinafter "OCC Decision") rejecting the Administrative Law Judge Shipe's Recommended Decision (hereinafter "ALJ Decision") deny petitioner due process and depart from the accepted and usual course of judicial proceedings?
2. Does due process require an Agency (i.e., the OCC) to halt its civil penalty proceeding and reevaluate its earlier orders of violation and conclusions thereon when it is unequivocally proven at trial that the evidence on which the agency based its orders of violation and its entire case was forged and fraudulent documents?
3. Does the substantial evidence standard comport with due process when the "substantial evidence" relied upon by the Agency as the basis for its orders of violation and conclusions thereon was forged and fraudulent documents which the agency itself admitted could not be relied upon?

LIST OF PARTIES TO THE PROCEEDING

The petitioner, William C. Sarsfield, was the petitioner below and petitioner in the Court of Appeals.

Respondent Office of the Comptroller of the Currency was the respondent below and the respondent in the Court of Appeals.

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OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

CITATION OF THE REPORTS OF OPINIONS IN THE CASE

The decision of the United States Court of Appeals is not appropriate for publication and may not be cited to or by the court of the Ninth Circuit except as provided by Ninth Circuit Rule 36-3.

The Memorandum of the District Court is reproduced in full in the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

This is an appeal of a denial for petition for review of a decision of the United States Department of the Treasury which denial was entered on January 2, 1997, Appendix ("APP.") pp. 2a-5a, in the Ninth Circuit of the United States Court of Appeals. Petitioner's Petition for Rehearing was filed February 19, 1997 (APP. pp. 7a-21a) and Denied on February 28, 1997 (APP. p. 6a). The statutory basis of subject matter jurisdiction is 12 U.S.C. § 1818(b) and (I). The statutory basis for jurisdiction of the United States Appellate Court and Supreme Court is 12 U.S.C. § 1818(h)(ii).

STATEMENT OF THE CASE

The statutory basis for jurisdiction of the Ninth Circuit Court of Appeals is 12 U.S.C. § 1818(h)(ii). This was a civil money penalty proceeding by the OCC against petitioner William C. Sarsfield ("Petitioner" or "Sarsfield"). Petitioner was and is on the Board of Directors of Sequoia National Bank ("the Bank"). The Bank entered into a consent order ("Consent Order") with the OCC dated March 4, 1992. (APP. p. 327a (ER 10)[1].)

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[1] The citation "ER" followed by a number refers to the exhibit so numbered in the Petitioner's original Excerpts of Record filed concurrently with Petitioner's Opening Brief in the United States Court of Appeals for the Ninth Circuit.

On November 20, 1993, the OCC issued a Notice of Assessment of Civil Money Penalties ("Notice") against Petitioner and other board members of the Bank, alleging that these parties had "caused, brought about, participated in, counseled, or aided and abetted" the Bank's alleged failure to comply with Articles VI, VII, §§§IX, X, XII, XIII and XV of the Consent Order. The OCC concedes compliance with the other articles of the Consent Order. The Notice prayed for the issuance of a final Order of Assessment directing Petitioner to pay a civil money penalty ("CMP") in the amount of $15,000. (APP. pp. 268a-276a (ER 38).)

Petitioner filed an Answer (APP. pp. 262a-264a (ER 39)) and requested an administrative hearing. (APP. pp. 265a-267a (ER 40).) On June 7-10, 1994, the matter was heard by Administrative Law Judge ("ALJ") Arthur L. Shipe. On February 3, 1995, ALJ Shipe issued his Recommended Decision. Judge Shipe found no violations of Articles X or XV. Moreover, he found only "technical" violations of Articles VI, VII, IX, XII, and XIII.

Judge Shipe specifically found that Petitioner Sarsfield (and the rest of the Board) "... sincerely wanted to do that which was in the best interest of the Bank." (APP. p. 107a at p. 112a (ER 52).) Judge Shipe further found that the technical violations were not "... flagrant or intentional, for [in the courts] opinion the evidence demonstrates that substantial effort was undertaken to attempt compliance with the OCC mandates" (APP. p. 107a at p. 122a (ER 52).) Judge Shipe further referenced the "good faith of the Respondent (Sarsfield)" and described his substantial efforts to accomplish compliance with the Consent

Order. (APP. p. 107a at p. 123a (ER 52).)

At the June 1994 trial, evidence came out of the deep personal animosity that a minority faction on the Board (Directors Henning and Bolles) felt towards Petitioner and the efforts they took to distort and prejudice the OCC's view of the internal operations of the Bank. Indeed, the OCC itself admitted in its Prehearing Statement that the Henning/Bolles faction on the Bank's Board

> "... acted as a roadblock ... taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices ... .
> "[t]he minority group ... equated anything that was beneficial to the majority group as a detriment to the Bank. This simplistic mathematics ignores the reality that the primary duty of the minority group directors during the period of noncompliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the Board." (APP. p. 218a at pp. 219a-221a (ER 41).)

Henning admitted that starting in 1991, he engaged in a campaign to "get rid of" Petitioner (APP. p. 222a at pp. 230a-231a (ER 47 at 797:15-19).), in which he "got in bed with" the OCC as far back as 1991 for that purpose (APP. p. 222a at pp. 230a-232a (ER 47 at

798:15-21).) Henning further admitted that he surreptitiously forged and submitted to the OCC (of course without the knowledge of Petitioner or the other members of the Board) false and misleading "reports" in OCC format to disguise their real source (APP. pp. 222a-229a (ER 47 at 784:3-789:14).), so that the OCC would adopt the information as true in the mistaken belief that it was receiving official reports from the Bank. In fact, the OCC submitted these very same forged documents (APP. pp. 277a-295a, 296a-320a, 321a-326a, 328a-329a, 330a-346a (ER 4; ER 3; ER 6; ER 24; and ER 34).) as the basis for the reports of examination, consent order and subsequent findings of non-compliance during the period 1991-1993. These forged documents contained outrageously bizarre statements and accusations about Petitioner and the management of the Bank which were untrue and not corroborated by any competent evidence.

The OCC nevertheless chose to believe all of this diatribe without once questioning Petitioner about it or even disclosing to him that they were receiving these bizarre forged "reports" ostensibly from the Bank. Thereafter, the OCC required the Bank to enter into the Consent Order on March 4, 1992. (APP. p. 327a (ER 10).) It also came out in Henning's trial testimony that at a meeting in August of 1992, the OCC had conceded that its real purpose behind the Consent Order was to force Mr. Sarsfield out of bank management. (APP. p. 222a at pp. 230a-232a (ER 47 at 797:20-798:19).) Despite ample opportunity to do so, the OCC never produced any witness willing to deny the accuracy of this testimony.

Petitioner Sarsfield worked long and hard after the March 4, 1992 Consent Order to ensure Bank compliance. Sarsfield reduced his salary 30 percent, and increased his hours to approximately 60 hours per week while he worked to ensure compliance. (APP. p. 244a at pp. 249a-250a (ER 45 at 296:9-23).) In accordance with the Consent Order, Sarsfield prepared and submitted to the OCC exhaustively-detailed monthly reports documenting the steps being taken by the Bank to comply with each and every Article of the Consent Order. At trial, Mr. Sander (the OCC examiner in charge of the 1991-1993 examinations of the Bank) admitted that there was never any occasion when he asked Petitioner for any information that he failed to give nor could he think of any example of ever asking Petitioner to do anything that he refused to do. (APP. p. 251a at 255a (ER 42 at p. 152:20-25).)

In August 1992, recognizing that the Henning/Bolles minority faction (which ironically comprised two-thirds of the Compliance Committee in charge of compliance) would continue to undermine the Bank's efforts at compliance with the Consent Order as long as he remained in office, Petitioner prepared a proposed "action plan" setting forth the direction the Bank should take to ensure continued compliance with the Consent Order. Petitioner further caused this "action plan" to be adopted by the Board, and then resigned from active participation in the management of the Bank. (APP. pp. 244a-248a (ER 45 at 290:7-293:12).) Within a few days, Petitioner was hospitalized, having lost approximately half his blood due to ruptured ulcers. (APP. p. 244a at p. 250a (ER 45 at 298:1-10).)

The OCC's other "star" witness (Bolles) admitted that the action plan submitted by Petitioner in August of 1992, if adequately implemented by subsequent management, would have responded to all of the remaining issues in the Consent Order. (APP. pp. 240a-242a (ER 46 at 831:3-832:20).)

Mr. Ragus (assistant to Mr. Sander) admitted that he was not dealing with Petitioner on compliance issues after August of 1992. (APP. pp. 259a at p. 260a (ER 43 at 233:5-8).) Mr. Sander admitted that Petitioner was "no longer involved in management after August 1992 (APP. p. 251a at pp. 257a-258a (ER 42 at 734:23-735:2).) and was not "involved with ... compliance with the Consent Order" after that period. (APP. p. 251a at p. 253a (ER 42 at 104:19-22).)

At trial, the OCC relied heavily on the testimony of Henning and Bolles, the minority faction. While the Notice had sought a CMP of $5,000 from each of these directors, just prior to trial the OCC agreed to reduce these CMP's to $950 each. These agreements were not signed in final until immediately after Henning and Bolles had cooperated and testified at trial, however. (APP. p. 222a at pp. 234a-237a (ER 47 at 803:7-806:3); and APP. p. 180a at p. 217a (ER 48).)

The OCC's complicity with Henning and Bolles as against Petitioner went far beyond the reduced CMP agreements in this proceeding. This was evidenced by the fact that the OCC sent Henning unredacted copies of OCC files, for him to use against Petitioner in a shareholder derivative suit filed by one bank shareholder as a result of the controversy generated by the Henning/Bolles/OCC campaign

against Petitioner. (APP. pp. 68a-82a (ER 53 at Exh. 1).) Providing these unredacted documents was contrary to both statute and agency directive.

After hearing Petitioner's evidence of this intentional sabotage by the Henning/Bolles faction, Judge Shipe agreed finding that "... Their fierce disagreement, however, which actually deteriorated to a level of personal hatred between some, unfortunately precluded the effective accomplishment" of the Board's objectives of compliance with the Consent Order and acting in the best interest of the Bank. (APP. 107a at p. 112a (ER 52).) Judge Shipe recommended that Petitioner be assessed a CMP of $10,000. (APP. p. 107a at p. 123a (ER 52).)

Both Petitioner and the OCC filed exceptions to the ALJ's decision. (APP. pp. 68a-82a and 83a-105a (ER 53, 54).) The OCC issued its final Decision and Order ("OCC Decision") dated July 21, 1995. The OCC rejected Judge Shipe's determination that there were no violations of Articles X and XV and adopted Judge Shipe's determination that violations of the other articles had occurred. The OCC Decision ordered Petitioner to pay a CMP in the amount of $10,000. (APP. pp. 41a-67a (ER 55).)[2]

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[2] Obviously, it is not the amount of the CMP that motivates petitioner in these proceedings, since his legal costs exceed both OCC's recommendation of $15,000 and Judge Shipe's recommendation of $10,000. Nor is it merely the "principle" of the matter. Rather, Petitioner's entire 35-year career, as well as his future livelihood and retirement, are at stake. The OCC, in collaboration with the Henning/Bolles faction has already successfully forced Petitioner out of

ARGUMENT

It was proven beyond any reasonable doubt at the June 1994 trial that the OCC's case was for all practical purposes punished entirely upon the forged and fraudulent "reports" surreptitiously prepared by Henning and submitted to the OCC. The OCC's steadfast refusal to recognize this fact and instead reject the ALJ Decision results in a denial of petitioners due process rights and significantly departs from the accepted and usual course of judicial proceedings. The agency knew at least by conclusion of the June 1994 trial that there was no substantial evidence to support most of its initial conclusions of non-compliance with the Consent Order. Notwithstanding this clear knowledge, the OCC abused its regulatory powers by rejecting the ALJ Decision and entering its own Decision which it knew to be erroneous and unsupported by any substantial evidence.

The record below demonstrated that there was no "substantial evidence" to support the agencies findings of fact. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Transcon v. AT&T Technologies, Inc., 89 F.3d 559, 564 (9th Cir. 1996); Fed. Carr. Cas. P. 84,018.)

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any active role in the Bank's management. If the unsupported, arbitrary and capricious findings in the OCC Decision are allowed to stand, Petitioner's ability to continue to earn his livelihood as a banking professor, as well as consultant and expert in banking operations, are seriously jeopardized. That is what is at stake in this proceeding, not just $10,000.

Substantiality of the evidence must take into account whatever in the record detracts from its weight. (Nibali v. United States, 589 F. 2d 514, 516 (Ct. Claims 1978); 218 Ct.Cl. 547; Blackburn v. Martin 982 F. 2d 125, 128 (4th Cir. 1992); 81 IER Cases 273.) This point of law is particularly critical to this case, since the OCC's decision is based almost entirely on the "statements" of Henning and Bolles. In his Reply Brief, Petitioner pointed out that the Excerpts of Record submitted by the OCC in support of the ROB relied heavily on draft "meeting notes" (i.e., statements) of Henning and/or Bolles. (See APP. p. 22a at p. 29a, *et seq.*)This is absolutely critical in determining the "substantiality" of the evidence supporting the OCC's findings, because the OCC has itself argued that ". . . Henning's uncorroborated statements cannot be relied upon." (APP. p. 41a at p. 63a (ER 55).) The OCC made this argument in attempting to diffuse the uncontroverted testimony by Henning in which he disclosed the OCC's admissions to him that the Consent Order of March 1992 was concocted by the OCC for the specific purpose of "getting rid of Sarsfield." Having judicially admitted that Henning's "statements" cannot be relied upon, the OCC cannot avoid the impact of this statement in light of the fact that OCC's entire case is itself premised almost exclusively on the "uncorroborated statements" of Henning. In other words, by admitting that Henning's "statements" are unreliable, the OCC is admitting that there is no substantial evidence supporting its

own case.[3]

A finding counter to uncontroverted evidence is not supported by substantial evidence. (Evans v. Heckler, 734 F. 2d 1012, 1015 (4th Cir. 1984); 5 Soc.Sec.Rep.Ser. 252.) The evidence at trial was uncontroverted that Henning/Bolles embarked on a personal vendetta against Petitioner starting in 1991 and used the OCC with its extraordinary regulatory powers to accomplish their purpose of getting rid of Sarsfield. More importantly, Henning's testimony at the trial in which he related the OCC's frank admissions to him that the March 1992 Consent Order was concocted specifically for the purpose of getting rid of Sarsfield went uncontroverted. Under the holding of the Evans case, this evidence is conclusive on both the OCC and this Court and mandates a finding that the OCC has proceeded in an arbitrary and capricious manner as far back as March of 1992. Moreover, Henning's uncontroverted testimony at trial disclosing the surreptitious preparation and presentation to the OCC of "reports" which were not official documents of the Bank or the Compliance Committee is likewise binding on the OCC and this Court. As a result, given the fact

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[3] It is also worthy of note that all of the written "reports" of Henning were erroneously admitted into evidence. Although Petitioner objected to them as hearsay at the June 1994 trial, they were admitted over these objections, presumably based on the "business records" exception to hearsay rule. However, Henning's subsequent testimony at the trial in which he admitted that these "reports" were surreptitiously prepared (i.e., "forged") and submitted to the OCC without the knowledge of the Bank, rendered the "business records" hearsay exception inapplicable since the "reports" obviously were not prepared "in the regular course of business" as required for that exception.

that the OCC's case was premised almost entirely on these "reports," it is uncontroverted that there is no "substantial evidence" to support the OCC's case. There is no evidence in the record to indicate that the OCC knew before the June 1994 trial that the "reports" which formed the basis for its conclusions of non-compliance with the Consent Order were in fact fraudulent and forged documents. However, it is beyond controversy that the OCC learned of this fatal defect in its case during that trial. Notwithstanding this knowledge, the OCC rejected in its entirety the Recommended Decision of the trial judge which took into account the lack of substantial evidence to support the OCC's case. Worse, the OCC then entered its own Decision which reiterated all of its pre-trial conclusions of non-compliance, without regard to the fact that it had been conclusively proven that the evidentiary basis for those conclusions was nothing more than forged and fraudulent surreptitious "reports" submitted by Henning/Bolles as part of their personal vendetta to force petitioner out of the banks management. By doing so, the OCC violated petitioners rights to due process and allowed itself to now knowingly participate in the personal vendetta by Henning/Bolles against petitioner. Such regulatory abuse and prosecutorial misconduct is a clear violation of petitioner's due process rights as well as a clear departure from the accepted and usual course of judicial proceedings, which has now been sanctioned by the Appellate Court, which

mandates this Courts exercise of its supervisory powers to avoid such abuses.

Dated: July 28, 1997

Respectfully submitted,

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Supreme Court, U.S.
FILED

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APPENDICES VOLUME I OF III

(1a - 105a)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

WILLIAM C. SARSFIELD

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

No. AA-EC-93-144

WILLIAM C. SARSFIELD

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

105PP

APPENDIX A

[Filed Jan. 2, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

AA-EC-93-144

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

[Filed Jan. 2, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

AA-EC-93-144

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

MEMORANDUM*

Petition to Review a Decision of the United States Department of the Treasury

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Argued and Submitted: December 9, 1996

Decided: January 2, 1997

Before: FARRIS, BEEZER, and TASHIMA, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

MEMORANDUM

STANDARD OF REVIEW

An agency's findings of fact must be upheld if supported by substantial evidence in the record. Transcon Lines v. AT&T Technologies, Inc., 89 F.3d 559, 564 (9th Cir. 1996). Substantial evidence means more than a mere scintilla but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

Agency decisions may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Id. at 563.

DISCUSSION

Sarsfield was an executive officer and Chairman of the Board at Sequoia National Bank when the consent order was signed in March 1992. He did not relinquish his executive position until August 1992, at which point the Articles at issue had already been violated. He remained Chairman of the Board into January 1993. Sarsfield was an institution-affiliated party as an executive and as a director. As such, he was responsible for Sequoia's compliance with the consent order. His intent is inapposite. See 12 U.S.C. § 1818(i)(2)(A).

Sarsfield argues that, for a variety of reasons, the Comptroller's conclusion that seven Articles of the consent order had been violated was not supported by substantial evidence. We have carefully reviewed the record. Sarsfield's contentions are not

supportable. In particular, this record does not demonstrate 1) illicit collusion between the OCC and members of Sequoia's board; 2) that the OCC was unaware of the source of documents; 3) that the OCC waived compliance with any of the Articles; 4) that Sarsfield acted entirely in good faith to comply with the consent order; or 5) that bank management, not Sarsfield, was responsible for noncompliance. Further, Sarsfield recognizes, as he must, that some consent order Articles were not complied with in the time required.

The Comptroller's findings that Articles VI, VII, IX, X, XII, XIII, and XV of the consent order were violated, and the imposition of a $10,000 Civil Money Penalty for those violations, are supported by substantial evidence. The Comptroller's decisions were neither arbitrary nor capricious.

PETITION FOR REVIEW DENIED.

[Filed Feb. 28, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 95-70664

AA-EC-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

ORDER

Before: FARRIS BEEZER, and TASHIMA, Circuit Judges.

The Petition for rehearing of Petitioner Sarsfield, filed February 19, 1997, is DENIED.

APPENDIX B

[Filed Feb. 19, 1997]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 95-70664

OCC AA-EC-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

PETITION FOR REHEARING OF MEMORANDUM OF PETITION TO REVIEW A DECISION OF THE UNITED STATES DEPARTMENT OF THE TREASURY [FRAP 40]

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I. INTRODUCTION

This Petition for Rehearing is submitted pursuant to analysis and judgment by counsel for Petitioner that the Court's January 2, 1997, Memorandum denying the Petition to Review a Decision of the United States Department of the Treasury incorrectly analyzed and decided the case. (Appendix A.) In particular, this Petition for Rehearing is based on the existence of the following situation:

1. The decision overlooked material points of law; and
2. The decision overlooked material points of fact.

As an introductory matter, it is respectfully submitted that the complexity of the issues and the volume of the record raised by the Petition for Rehearing cannot be adequately addressed or decided with the one-paragraph analysis set forth in the Court's Memorandum filed and entered January 2, 1997. Moreover, even assuming for the sake of argument that the five sub-points enumerated in the Court's one-paragraph discussion were correct, that analysis does not address the two primary bases for the Petition, i.e., that the Office of the Comptroller of the Currency's ("the OCC") Final Decision and Order dated July 21, 1995, which completely rejected all of the findings in Petitioner's favor entered by Administrative Law Judge ("ALJ") Shipe in his Recommended Decision, was not supported by substantial evidence, and was arbitrary and capricious.

II. THE COURT'S MEMORANDUM OVERLOOKS MATERIAL POINTS OF LAW AND FACT.

There are three material points of law raised by Petitioner which this Court has apparently overlooked. These are:

1. Where the agency has "overruled" the ALJ's Recommended Decision, and where the disagreement between the agency and the ALJ involve questions of fact and credibility, less deference is accorded the agency's determination and a reviewing court is required to examine the evidence more critically in determining whether there is substantial evidence to support that agency decision. (Blackburn v. Martin, 982 F. 2d 125, 128 (4th Cir. 1992).) Judge Shipe found no violations of Articles X and XV. Moreover, he found only "technical" violations of Articles VI, VII, IX, XII and XIII. Judge Shipe specifically found that Petitioner Sarsfield acted in "good faith" and that he "... sincerely wanted to do that which was in the best interest of the Bank." Under the Blackburn opinion, this Court is required to examine more critically (and give less deference to the OCC) the evidence with respect to these Articles and Judge Shipe's findings on them. Petitioner respectfully submits that he is entitled to a detailed analysis by this Court of exactly what "substantial evidence" exists to warrant the OCC's complete rejection of the ALJ's determinations after hearing the witnesses and evaluating their credibility.[1] Petitioner

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[1] While Petitioner must of course concede that under the statutory scheme operative herein, the OCC has the "right" to ignore and overrule

respectfully submits that, when such an analysis is done, it must be concluded that at a minimum the findings of the ALJ in his Recommended Decision (ER 52) should be reinstated.

2. Substantiality of the evidence must take into account whatever in the record detracts from its weight. (Nibali v. United States, 589 F. 2d 514, 516 (Ct. Claims 1978); Blackburn v. Martin 982 F. 2d 125, 128 (4th Cir. 1992).) This point of law is particularly critical to this case, since the OCC's decision is based almost entirely on the "statements" of Henning and Bolles. In his Reply Brief, Petitioner pointed out that the Excerpts of Record submitted by the OCC in support of the ROB relied heavily on draft "meeting notes" (i.e., statements) of Henning and/or Bolles. See Petitioner's Reply Brief at page 4, line 2 *et seq*. This is absolutely critical in determining the "substantiality" of the evidence supporting the

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the ALJ's determinations, Petitioner respectfully submits that notions of due process must also mandate a very strong burden on the agency if it elects to "overrule" the ALJ. Here, the ALJ heard four days of evidence, including the critical testimony of the OCC witnesses (examiners Sander and Ragus as well as former Bank Board members Henning and Bolles). As will be seen below, the OCC takes entirely inconsistent positions with respect to the credibility of Henning/Bolles and the weight to be given their "statements," on the one hand, contending that their "statements" cannot be relied upon to support Petitioner's arguments, while at the same time basing its entire case on the "statements" of Henning and Bolles (both in the form of their testimony and their numerous "reports" which form the exclusive basis for the OCC's findings.

OCC's findings, because the OCC has itself argued that ". . . Henning's uncorroborated statements cannot be relied upon." (ER 55, page 19.) The OCC made this argument in attempting to diffuse the uncontroverted testimony by Henning in which he disclosed the OCC's admissions to him that the Consent Order of March 1992 was concocted by the OCC for the specific purpose of "getting rid of Sarsfield." Having judicially admitted that Henning's "statements" cannot be relied upon, the OCC cannot avoid the impact of this statement in light of the fact that OCC's entire case is itself premised almost exclusively on the "uncorroborated statements" of Henning. In other words, by admitting that Henning's "statements" are unreliable, the OCC is admitting that there is no substantial evidence supporting its own case.[2]

3. A finding counter to uncontroverted evidence is not supported by substantial evidence. (Evans v. Heckler, 734 F. 2d

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[2] It is also worthy of note that all of the written "reports" of Henning were erroneously admitted into evidence. Although Petitioner objected to them as hearsay at the June 1994 trial, they were admitted over these objections, presumably based on the "business records" exception to hearsay rule. However, Henning's subsequent testimony at the trial in which he admitted that these "reports" were surreptitiously prepared (i.e., "forged") and submitted to the OCC without the knowledge of the Bank, rendered the "business records" hearsay exception inapplicable since the "reports" obviously were not prepared "in the regular course of business" as required for that exception.

1012, 1015 (4th Cir. 1984).) The evidence at trial was uncontroverted that Henning/Bolles embarked on a personal vendetta against Petitioner starting in 1991 and used the OCC with its extraordinary regulatory powers to accomplish their purpose of getting rid of Sarsfield. More importantly, Henning's testimony at the trial in which he related the OCC's frank admissions to him that the March 1992 Consent Order was concocted specifically for the purpose of getting rid of Sarsfield went uncontroverted. Under the holding of the Evans case, this evidence is conclusive on both the OCC and this Court and mandates a finding that the OCC has proceeded in an arbitrary and capricious manner as far back as March of 1992. Moreover, Henning's uncontroverted testimony at trial disclosing the surreptitious preparation and presentation to the OCC of "reports" which were not official documents of the Bank or the Compliance Committee is likewise binding on the OCC and this Court. As a result, given the fact that the OCC's case was premised almost entirely on these "reports," it is uncontroverted that there is no "substantial evidence" to support the OCC's case. The Court's Memorandum of January 2, 1997, entirely ignores this evidence and law. Petitioner is entitled to some discussion of these points and a justification for the Court's decision to ignore this evidence and law.

III. THE COURT'S DECISION OVERLOOKS OTHER MATERIAL EVIDENCE.

In its one-paragraph "discussion" of the issues, the Court enumerated five sub-points to support its decision that the OCC's

findings were "supported" by substantial evidence and that his decisions "were neither arbitrary nor capricious." Petitioner respectfully submits that none of these sub-points deal with the issues raised by Petitioner's Petition, nor do they address any of the evidence or the issue of "substantiality of that evidence." The following sets forth Petitioner's position with respect to the Court's five points in the same order enumerated in the Court's Memorandum.

1. The Court first observed that the record "does not demonstrate illicit collusion between the OCC and members of Sequoia's Board." This observation exhibits a misapprehension of Petitioner's argument with respect to the relationship between the OCC and the Henning/Bolles faction. It is not Petitioner's position that the OCC intentionally engaged in "illicit collusion" with Henning and Bolles, at least prior to the June 1994 trial. Instead, as Petitioner's Opening Brief argued, the OCC was duped into allowing itself to be used by Henning/Bolles to advance their own personal vendetta against Sarsfield. As mentioned repeatedly throughout these proceedings, the evidence is uncontroverted that the OCC's primary purpose for the March 1992 Consent Order was to get rid of Sarsfield, which was of course the objective of Henning/Bolles all along. Because the OCC was unaware that the Henning/Bolles "reports" were all false documents surreptitiously prepared and submitted by Henning without the knowledge of the Bank, the OCC was unwittingly misled into believing that Sarsfield was actually doing all of the various things alleged by Henning and therefore used the March 1992 Consent Order and their extraordinary powers to

find violations (no matter how hyper-technical) of that Order to force Sarsfield out of the Bank. Again, it is critical to recognize that the evidence of Henning's false "reports" as well as the OCC's real purpose for the March 1992 Consent Order is uncontroverted.

With respect to Petitioner's "illicit collusion" argument, that is premised on the OCC's conduct starting with the June 1994 trial, at which Henning revealed for the first time that all of his "reports" to the OCC were in fact surreptitious forgeries and a fraud on the OCC. At this juncture, rather than re-evaluating their case and recognizing the possibility that they had been misled by Henning, the OCC stubbornly plowed ahead with its regulatory juggernaut and completely rejected the findings of the ALJ which were favorable to Sarsfield. Having done so, Petitioner respectfully submits that the OCC's conduct is improper, whether it is characterized as "illicit collusion" or something else.

The Court's Memorandum completely overlooks and fails to discuss the impact of Henning's testimony re the OCC's admissions of the real purpose of the March 1992 Consent Order. The Court also fails to address Henning's frank admissions of the fraudulent nature of the "reports" that he surreptitiously sent to the OCC, and the inescapable fact that the OCC's "findings" cite almost exclusively these Henning "reports" as evidentiary support. This is especially critical since the OCC has admitted that "Henning cannot be relied upon." (ER 55, page 19.)

2. The Court found that the "record does not demonstrate

that the OCC was unaware of the source of documents." This observation is partially correct and partially incorrect. It is incorrect insofar as OCC examiners Sander and Ragus both admitted that certain of their key determinations as to noncompliance were based upon reliance on documents which they were forced to admit at trial were in fact unreliable evidence. In particular, Sander admitted that his findings of noncompliance of Articles VI and VII were "flawed" when it was demonstrated to him at the June 1994 trial that he had relied upon an outdated 1986 "Asset and Liability Management Policy." (See Petitioner's Opening Brief at pages 13 and 14.) Moreover, Mr. Sander relied on a "report" prepared by Bolles in March of 1993. At trial, he admitted that he should have (but failed to) taken into account the fact that this so-called "report" was not an official Bank document, but one generated by a disgruntled and voted-out-of-office member of the minority faction of the Board. (See Petitioner's Opening Brief at page 14, first full paragraph.)

This evidence conclusively demonstrated that in fact the OCC had been completely unaware of the source and unreliability of several critical documents upon which they had premised their conclusions of noncompliance. Moreover, at trial, examiners Sander and Ragus both admitted that their reliance upon these documents rendered many of their conclusions "flawed" and in need of further examination.

The Court's observation No. 2 is also incorrect with respect to the fraudulent Henning "reports." The fraudulent nature of these reports was unknown to everyone until Henning testified at the June

1994 trial. In his Reply Brief (at page 4), Petitioner pointed out that the OCC's findings relied almost entirely on these fraudulent "reports," in particular, ER 69, 70, 71, 73, 74, 76, 77, 78, 79, 84, 85, 100, 101. (See also ER 22, 23, 25, 26 and 27 which are Henning/Bolles' "reports" introduced into evidence by the OCC.) While Petitioner respectfully submits that the Court's observation that the record did not demonstrate the OCC was unaware of the fraudulent nature of these "reports" is incorrect, the Court's opposite conclusion actually supports Petitioner, not the OCC. If in fact the OCC was actually aware that these "reports" by Henning were fraudulent, submitted surreptitiously and without knowledge of the Bank, and for the purpose of advancing Henning's own personal vendetta against Sarsfield, that would conclusively demonstrate illicit collusion between the OCC and Henning. No more clear case of such collusion can be imagined.

3. The Court further observed that "no evidence existed that the OCC waived compliance with any of the Articles." Petitioner respectfully submits that this observation overlooks the evidence and arguments presented in Petitioner's Opening Brief at page 16 with respect to Article IX. Moreover, Petitioner's argument is not that the OCC "waived" compliance with Article IX. Rather, Petitioner's arguments and the evidence in support thereof demonstrate clearly that the OCC had agreed to a "prioritization" of loan policy revisions. This prioritization allowed the Bank to defer revision of its loan policy manual to the latter part of 1992. Although Petitioner conceives that these loan policy revisions were not accomplished by December 31, 1992, Petitioner also respectfully

submits (and the evidence is uncontroverted) that he was no longer responsible as management for compliance issues after his resignation in August of 1992. Indeed, both examiners Sander and Ragus admitted as much at trial.

4. The Court further observed that "The record does not demonstrate that Sarsfield acted entirely in good faith to Comply with the consent order."

Petitioner respectfully submits that this naked "observation" without more analysis is a denial of due process. If this Court wishes to make such a finding, Petitioner is entitled to (1) an analysis of why the ALJ's (Judge Shipe) observations to the contrary should be rejected, as well as (2) a recitation as to what evidence exists to show any lack of "good faith" by Petitioner Sarsfield.

5. The court's final observation was that "The record does not demonstrate that Bank management, not Sarsfield, was responsible for noncompliance."

This observation again exhibits a misapprehension by the Court, of Petitioner's arguments. With the exception of compliance with Article IX, after August of 1992 (i.e., the "prioritization" issue), Sarsfield has never contended that "Bank management," rather than the Board and himself, was responsible for compliance.

Finally, the Court's observation that Sarsfield ". . . did not relinquish his executive position until August 1992, at which point

the Articles at issue had already been violated" is flawed, circular logic. In the first place, Petitioner, of course, contends and believes that the evidence shows that there were no instances of noncompliance as of August 1992. The ALJ agreed, at least with respect to Articles X and XV. Moreover, each of the seven Articles in question present very different issues regarding timing for compliance and when compliance could, much less was required to, be accomplished. Such a broad statement by the Court simply ignores the bulk of the evidence in this case.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests rehearing on all of these issues.

DATED: February 18, 1997

Respectfully submitted,

CAPPELLO & McCANN LLP

/s/ _____

Michael W. McCann
Attorneys for Petitioner
William C. Sarsfield

Statement of Related Cases

Pursuant to Rule 28-2.6 of the Rules of the US. Court of Appeals, 9th Circuit, the undersigned, counsel of record for Petitioner, William C. Sarsfield, certifies that there are no known "related cases" (as that term is defined in Rule 28-2.6) pending before this Court.

DATED: February 18, 1997.

CAPPELLO & McCANN LLP

/s/_____

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William C. Sarsfield

[Filed Apr. 24, 1996]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 95-70664

OCC AA-ED-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF ABBREVIATIONS

Within Petitioner's Reply Brief the following reference abbreviations are used:

"ER" Refers to the "Petitioner's Excerpt of Record" served and filed herewith, and provides citations throughout the "...Brief," to items contained in Petitioners Excerpt of Record."

"AR" Refers to the "Administrative Record" prepared by the Office of the Comptroller of the Currency. This is a secondary citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the "Administrative Record."

"WS" Refers to items of evidence offered by the Petitioner, William C. Sarsfield, at the underlying trial of this matter before the Honorable Arthur J. Shipe. This is a supplemental citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the Administrative Record."

"OCC" Refers to items of evidence offered by the Respondent, Office of the Comp-troller of the Currency, at the underlying trial of this matter before the Honorable Arthur J. Shipe. This is a supplemental citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the Administrative Record."

"POB" Refers to Petitioner William C. Sarsfield's Opening Brief.

"ROB" Refers to Respondent OCC's Opposition Brief.

I.

INTRODUCTION

Respondent OCC's Opposition Brief (hereinafter cited as "ROB") suffers from the same lack of competent evidentiary support that occurred at the trial of this matter. While not every misstatement of fact can be corrected in the 20-page limit imposed for this brief, Petitioner will demonstrate below that all of the significant "facts" cited by the OCC in their brief lack evidentiary support. In each instance, the evidence cited by the OCC in support of their alleged "facts", either does not establish the fact, or is merely a cite to the OCC's own self-serving findings of fact and conclusions of law (ER 52, beginning at p. 20.) which themselves were unsupported by competent evidence other than citations to unsupported accusations in forged documents surreptitiously created by Henning and Bolles and submitted to the OCC which the OCC subsequently relied upon without question or investigation.

II.

RESPONSE TO OCC'S "COUNTER STATEMENT OF THE FACTS"

The following is a listing of some of the more significant misstatements of fact, followed by the correct statement:

A. The OCC contends that "Sequoia has had a troubled history." (ROB, p. 2.) Other than the OCC's own unsubstantiated statement to this effect, there is no proof in the record. In fact, the only time Sequoia has had any "trouble" was in 1992 when it

suffered the first two loan losses in its history. Much like the proverbial ostrich with its head in the sand, the OCC continues to contend that the Bank has been poorly managed and operated over the years, notwithstanding the fact that its own bank examiners acknowledged at the trial in this matter that Sequoia's loan loss history was uniquely excellent.[1]

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[1] In fact, the only "trouble" Sequoia Bank has experienced during its years of operations is the direct result of the unfortunate collaboration between the OCC and the Henning/Bolles minority faction of the Bank's board. That collaboration, and the OCC's participation therein, led to the filing of a shareholder derivative suit against the Bank's Board of Directors in 1993 (Laurence v. Sarsfield, et al., San Francisco Superior Court Case No. 950665). Other than the distractions and legal costs associated with dealing with the OCC and this shareholder derivative suit, Sequoia Bank continues to operate successfully to this day. This Court is requested to take judicial notice of the "Opinion and Order Following Trial" issued by Judge Warren in the share- holder derivative case on February 22, 1996 terminating that action. (attached hereto as ER 107.) In his opinion, Judge Warren found the report of the Bank's Special Litigation Committee was independent and objective and correct in its analysis that the Bank's loan portfolio had been properly underwritten and administered, that its liquidity, capital and reserves had all been properly handled, and that none of the allegations made by the shareholder plaintiff (which were virtual verbatim repeats of the charges made by the OCC herein) caused any damage to the Bank. (ER 107, pp. 15-20.)

B. "Between June and December 1992, Sequoia's Board split into two factions. Petitioner was a member of the majority faction, which could always outvote the minority faction." (ROB, p.2)

The Henning/Bolles minority faction already existed long prior to June 1992 and had already been collaborating with the OCC for several months in support of its vendetta against Petitioner. While, of course, any majority can outvote a minority, the OCC's simplistic logic that Henning/Bolles could not have obstructed the Bank's compliance with the consent order is unsupported by fact as well as the OCC's own admission to the contrary. (ER 41, pp. 10-11) the OCC's argument ignores the fact that Henning and Bolles occupied two out of three of the seats on the Compliance Committee which was responsible for the Bank's compliance with the Consent Order and, therefore, were able to control that process and, more importantly, they were able to manipulate and mislead the OCC into adopting the Henning/Bolles view of that process.

C. "Petitioner obstructed compliance with the Order." (ROB, p. 4). The only "evidence" cited by the OCC is its own purported "finding of fact" (which the ALJ rejected) and a memo of a purported "Compliance Committee" meeting at which Henning and Bolles were the only attendees. It is difficult to justify the OCC continuing to make this unfounded accusation when both OCC examiners (Sander and Regis) testified to the contrary, and the ALJ found to the contrary.

D. Similarly, the OCC contends that Petitioner "ignored the OCC," opposed efforts by other Board members to comply, and advised the Bank's president not to charge off a certain loan. (ROB, P. 4.) Again, the only cited evidence is the OCC's own purported "findings" and a memorandum written by Henning/Bolles regarding a secret meeting they had with the OCC in December of 1992. The testimony of the OCC's own examiners was again directly contrary to the position now taken by the OCC.

E. The OCC denies that it held the settlement agreement over Henning's head until after he testified, claiming that the Henning/Bolles "settlement agreements" were executed before they testified. (ROB, p. 5.) It is astounding that the OCC continues to make this assertion in light of Henning's direct and clear admission at trial that he was "praying" that the OCC "go-along with" his request that they settle for a payment below one thousand dollars ($1,000). (ER 47, pp. 805-806.) It is obvious from this testimony that at the very moment he was testifying, Henning was awaiting word from the OCC that it had agreed to his requested terms for settlement. It was not until one week <u>after</u> the trial that the OCC actually <u>approved</u> the settlements. (ER 48, Exh. A.) Instead of conceding these obvious facts demonstrating the ongoing sordid relationship with the Henning/Bolles faction, the OCC disingenuously states that the "... Henning and Bolles settlement agreements were executed before they testified ..." (ROB, p. 5.) Not surprisingly, the OCC can cite to no evidentiary support for this subterfuge. As the OCC's letter to the ALJ on June 16, 1994 (one week after the trial) admits, these settlement agreements were not

"approved by the agency" (which is a condition to their effectiveness) until after Henning/Bolles testified.

F. The OCC continues to deny the clear and uncontradicted evidence of its collusion with Henning/Bolles against Petitioner, claiming that "... Petitioner relied on hearsay to establish the collusion's existence ... This hearsay went uncorroborated." (ROB, p. 5.) The purported "hearsay" referenced by the OCC was Henning's revelation that in August of 1992, the OCC had conceded to Henning/Bolles that the real purpose behind the Consent Order was to force Mr. Sarsfield out of the Bank. The OCC's belated characterization of this evidence as "hearsay" is, of course, unavailing since no objection was made to this testimony at trial. Moreover, if such an objection had been made, it certainly would have been overruled pursuant to the admission against interest exception to the hearsay rule. While the OCC complains that this evidence was "uncorroborated", the OCC still offers no explanation as to why it never produced any witness willing to deny under oath the accuracy of Henning's sworn testimony.

Finally, the OCC itself admits that "... Henning's uncorroborated statements cannot be relied upon." (ER 55, p. 19.) This frank admission by itself entirely guts the OCC's case, since the OCC itself relied heavily upon the "statements" of Henning contained in the numerous forged documents submitted by Henning/Bolles to the OCC which contained the reckless and unsupported accusations against Petitioner that the OCC subsequently plagiarized verbatim into its pleadings in this case. While the OCC has been furiously back-

pedaling since the June 1994 trial in an attempt to now distance itself from the Henning/Bolles faction, the record in this case speaks otherwise. For example, the Excerpts of Record submitted by the OCC in support of the ROB demonstrates heavy reliance on draft "meeting notes" prepared by Henning and/or Bolles. (See ER 69, 70, 71, 73, 74, 76, 77, 78, 79, 84, 85, 100 and 101.) See also ER 22, 23, 25, 26 and 27 which are Henning/Bolles' "reports" introduced into evidence by the OCC. Without exception, each one of these "reports" is nothing more than a self-serving, unsubstantiated and reckless attack on Petitioner by Henning/Bolles which the OCC incorporated verbatim without question into its own findings and conclusions. In fact, at the recent trial (and dismissal) of the shareholder derivative action, Henning candidly admitted that:

> "... I had gone into this with a lot of bitterness and bias, I admit that, and a siege mentality. I will be very frank about that ... There were these tremendous splits and personal animosities [among the parties] that this court can never appreciate which in many ways were juvenile." (ER 107, p. 1-2.)

Judge Warren clearly recognized that the allegations of the plaintiff shareholder (which, were simply a regurgitation of the OCC's allegations in this case) were premised entirely upon this unfortunate "siege mentality" and "bitterness and bias" which permeated and fatally infected all of the Henning/Bolles "reports" and testimony upon which the OCC primarily relies to prove its case.

G. The OCC continues to assert that "... Petitioner maintain the dominant position ..." on the Board "... during the relevant period." (ROB, p. 6.)

Again, this astounding misrepresentation of fact is exemplary of the regulatory excess and prosecutorial misconduct that permeates the entire OCC case. In the first place, immediately prior to this misrepresentation, the OCC states that "... in arriving at his decision, the Comptroller did not rely upon the testimony of, or evidence generated by, Henning or Bolles. (ROB, bottom of p. 5.) Yet, in arguing that Petitioner was "a dominant figure" in the next sentence, the OCC cites as its supporting evidence a Bolles memorandum (ER 84), the testimony of Henning (ER 106), another Bolles memorandum (ER 101)[2], and a Henning/Bolles "Compliance Committee Meeting" memo. (ER 79) So much for the OCC's assertion that it does not premise its entire case on "evidence" generated by Henning/Bolles. Moreover, the OCC's brief is directly contradicted by the testimony of its own examiners that they were not dealing with Petitioner on compliance issues after August of 1992, that Petitioner was "no longer involved in management after August 1992" and that Petitioner was not "involved with ... Compliance With the Consent Order" after that period." (POB, p. 5.)

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[2]This is the infamous purported "Response to Report of Examination (dated December 31, 1992)" submitted and prepared by Bolles in May of 1993 after he had been voted off the Bank's Board, a fact of which the OCC examiners admitted at trial they were unaware and should have considered before relying upon the document.

III.
ARGUMENT

With respect to each of the Articles of the Consent Order at issue, the OCC does not deny or otherwise attempt to refute the evidence of compliance cited by Petitioner. Instead, the OCC again only recites its own unsupported conclusions (i.e., citations to ER 55) and to statements in Henning/Bolles documents which have been proven to be unreliable and which Henning subsequently recanted in the shareholder derivative suit. This tainted and unreliable "evidence" cannot meet the "substantial evidence" standard of review. In the interest of brevity, Petitioner will not again repeat citations to all of the evidence demonstrating compliance. Instead, this brief will focus on the lack of substantiality of the evidence the OCC cites to establish alleged noncompliance.

1. Article VI

The OCC cites three pieces of evidence in support of its argument that the Bank had not adopted a liquidity contingency plan — ER 21, ER 23 and ER 101. None of this evidence constitutes "substantial evidence" of noncompliance. The Catalano Report (ER 21, p. 2.) does not establish noncompliance. The one statement relied upon ("... the Bank should develop a contingency plan to be in place while the restructuring is being conducted") has been taken completely out of context. That isolated statement referred to the anticipated need to make additional revisions to the liquidity contingency plan if and when the Bank

implemented a "restructuring" of its fund management policy that Catalano was recommending. This innocuous sentence has nothing to do with and in no way obviates the plain evidence that a liquidity contingency plan was already in place and was carried out in a timely fashion sufficient to meet the 1993 maturation of certain large CD's. The OCC cannot cite a single statement by Catalano that the Bank's liquidity contingency plan was not sufficient to meet these needs. ER 23 is another Bolles "memorandum", this time containing double hearsay. Moreover, this self-serving statement by Bolles ignores all the evidence cited by Petitioner showing that the liquidity contingency plan was in place and implemented in the timely manner. Finally, ER 101 is the Bolles "report" dated May 28, 1993 and prepared by Bolles after he had already been kicked off the Bank's Board and five months after the date of alleged noncompliance. In addition to its unreliability, this report was plainly false and fraudulent in its assertion that "no liquidity contingency plan has been prepared." As Petitioner's undisputed evidence established, not only had such a plan been "prepared", it had already been implemented to meet the liquidity demands arising from the maturation of large CD's in March and April of 1993.

The OCC apparently finally recognized the infirmity of its position when, in its conclusion on Article VI, it admitted that as part of its liquidity contingency plan, the Bank had adopted and implemented a plan to sell loans prior to the early 1993 maturation of large CD's. Recognizing that this uncontroverted evidence destroyed its arguments of noncompliance, the OCC adopted the incredible fall-back position that this facet of the liquidity

contingency plan (i.e., loan sales) only demonstrates compliance with subsection 1 of Article VI, but not section 4. This is absurd — sale of assets to generate cash to meet anticipated maturation of large CD's is classic liquidity contingency management policy. The OCC's belated admission and disingenuous attempt to explain it away with a slight-of-hand argument is demonstrative of the fundamental lack or merit underlying the OCC's entire case from inception through to the present.

2. **Article VII**

The OCC concedes that the Bank "reduced the total number of dollars of volatile liabilities." As a fall-back, the OCC claims that the Bank "failed to develop alternative funding sources" and did not reduce volatile liabilities as a "percentage of overall deposits. This argument is premised on a logical absurdity. First, any reduction in volatile liabilities automatically results in a decrease of that component of "overall deposits" on a percentage basis. For example, if volatile liabilities represent $20 million out of the Bank's $100 million deposit base, a reduction of volatile liabilities to $10 million yields both a reduction in total dollars as well as a percentage reduction (20 percent vs. 11 percent). The OCC's mathematical theory is simply incorrect. Moreover, while the Bank developed and implemented plans to increase "core deposits," it was unfortunately unable to significantly increase that deposit base in the eight months prior to December 31, 1992. The Bank had historically relied upon volatile liabilities for 6 years prior to 1992. Unfortunately, when the OCC changed its policy in this regard in

1992, despite its best efforts to do so, the Bank was unable to increase core deposits in the short time frame allowed by the OCC. Such precipitous and arbitrary conduct by the OCC cannot form the basis for quasi criminal civil money penalties.

Finally, while admitting that the testimony of Examiner Sander was flawed due to his reliance upon outdated policy documents and his lack of knowledge of the Bank's loan sales, the OCC persists in claiming that Sanders' testimony must be "given deference." While this is a true policy statement in the abstract, such deference is not appropriate when it is demonstrated (indeed Sanders admitted on cross-examination) that the examiner's testimony is, in fact, seriously flawed in its foundation. In its ROB, the OCC repeats Sanders' errors by arguing that the Bank "sold loans totaling just $600,000", not the $5,000,000 in loans targeted for sale. (ROB, p. 15.) However, the evidence cited by the OCC shows that the $600,000 in sales was only as of May of 1992. The balance of the $5 million were sold in accordance with the Bank's plan to meet liquidity needs caused by maturation of large CD's in March/April of 1993. In an apparent attempt at a smokescreen, the OCC references ER 88 regarding a purported plan to sell "$11 million in home equity loans." (ROB, p. 15, fn 15.) ER 88 is an undated, unsigned document which the OCC identifies as "probably part of December 31, 1992 report of examination." (OCC excerpts of record, Vol. I, index.) This is hardly reliable evidence that would qualify as "substantial evidence" of noncompliance by the Bank.

3. **Article IX**

The OCC fails to rebut the clear and uncontroverted evidence of its initial acceptance of the adequacy of the Bank's loan policies in the first half of 1992 and its later acquiescence in the Bank's decision to prioritize final revisions to that loan policy until January of 1993 prior to resuming any lending activities. The OCC asserts that "... a review of Mr. Sanders' letter indicates that he did not approve the Bank's revised policy." (ROB, p. 16.) However, Mr. Sanders' letter (ER 8 and ER 63) states unequivocally that "... your letter appears to address our concerns regarding the adequacy of the loan policy ..." Again, recognizing the infirmity of its case, the OCC falls back on a purported "concession" by Petitioner in a 1995 pleading of lack of compliance with Article IX. Of course such a purported "concession" could not have formulated any part of the OCC's findings of noncompliance back in 1993. Moreover, such a "concession" never occurred — the OCC merely misconstrues and misreads Petitioner's arguments in ER 53 at page 11.

The OCC's position on Article IX is a classic example of hairsplitting and semantic nit-picking. The evidence is quite clear and entirely unrefuted that the OCC acknowledged the Bank's effective compliance with this article through June of 1992 and thereafter agreed with the Bank's prioritization of final revisions of its loan policy until January of 1993.

4. **Article X**

Petitioner submits this issue on his Opening Brief and the Recommended Decision of the ALJ (ER 52, pp. 11-13.)

5. **Article XII**

Again recognizing the infirmity of its position, the OCC for the first time falls back on the simplistic argument that because the Bank's reserves were at $650,000 in June of 1992 and because the two loan losses experienced by the Bank in December of 1992 (the only two loan losses in the Bank's history) totaled $692,000, the Bank's reserve calculation methodology therefore must be flawed. (ROB, p. 21.) This argument ignores the fact that, employing that very same methodology, the Bank increased its reserves after June of 1992 and before December of 1992 to a level that far exceeded the subsequent losses. (POB, p. 19, fn 5.) The OCC also now complains, for the first time, that the Bank did not develop an ALLL methodology "consistent with banking circular no. 201 and section 217 of the Comptroller's Handbook, etc." (ROB, p. 20-21) This argument ignores the fact that those publications employed ALLL calculation methodology premised principally upon utilizing a bank's prior history of loan losses as the cornerstone for the calculation. Again, because Sequoia Bank's prior six years of loan origination and administration was so efficient, the Bank had never experienced any loan losses prior to 1992. Given that fact, the OCC's blind insistence that the Bank utilize irrelevant policy publications again is demonstrative of the extent to which the regulatory function miscarried in this case.

6. Article XIII

The issue with respect to Article XIII is relatively simple. The evidence is uncontroverted that the Bank could not legally obtain updated financial information from real estate loans that were current on their payments, that the OCC had agreed that literal compliance with Article XIII was not required, and that only a "reasonable effort" to obtain updated information from problem loans was required. Petitioner made just such a "reasonable effort", obtaining updated information from some borrowers but not in cases that would jeopardize collection of the loans. This was a subjective and reasonable determination made by Petitioner (and one which, of course, turned out to be correct as all of these loans were collected). In essence, the OCC's case with respect to Article XIII rests on the premise that Petitioner should instead have acted unreasonably by jeopardizing the Bank's loan collection efforts and exposing it to potential lender liability claims by requesting financial information that borrowers could use to imply a commitment to renew the loan. Imposition of a quasi criminal civil money penalty under these circumstance is the ultimate "catch 22" elevation of form over substance and is arbitrary and capricious.

7. Article XV

Petitioner submits this issue on the arguments submitted in his opening brief.

IV.

CONCLUSION

In Sum, the OCC's Reply Brief substantiates and reaffirms what Petitioner has been saying all along, to wit:

1. The OCC failed to introduce any substantial evidence to prove noncompliance with any of the articles in question. Without exception, in support of each of its "findings" of noncompliance, the OCC cited as its only evidentiary support either one of the thoroughly discredited Henning/Bolles "reports" which in most instances were forged and fraudulent documents which purported to be Compliance Committee reports but, in fact, were surreptitiously prepared and submitted to the OCC. In some instances, the OCC also cited as evidentiary support its own reports of examination and other internally prepared documents, all of which themselves were premised entirely upon the same Henning/Bolles forgeries. The OCC's blind reliance upon these forged documents without question or independent investigation was explained by the startling revelation at trial that the OCC had been "in bed with" the Henning/Bolles faction since early 1991 in an effort to force Petitioner out of the Bank's management and that the Consent Order was imposed upon the Bank with the predetermined intent to ultimately find the Bank in noncompliance and force Petitioner out of day-to-day involvement in bank operations.

2. When the wild accusations and allegations in the Henning/Bolles "reports" are removed from the case, the OCC'S

purported "findings" of noncompliance stand naked of any evidentiary support. Moreover, in most instances, Petitioner demonstrated through cross-examination of the OCC examiners that the Bank was, in fact, in substantial compliance with each of the articles in question. By contrast, the OCC's assertions of noncompliance with each of the articles was in each instance hypertechnical and little more than highly subjective semantic nit picking.

3. Petitioner at all times acted in the utmost good faith and made Herculean efforts to see that the Bank was in compliance with the Article of the Consent Order until he was forced out of the Bank in August of 1992 by the OCC conspiracy with the Henning/Bolles faction.

Petitioner respectfully submits that the findings of the ALJ of his good faith and of the Bank's compliance with Articles X and XV should be affirmed, and the final decision of the OCC of noncompliance with Articles VI, VII, IX, XII and XIII should be vacated.

DATED: April 23, 1996. Respectfully submitted,

/s/ Michael W. McCann
CAPPELLO & McCANN
Attorneys for Petitioner
William C. Sarsfield

[Filed Jul. 26, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM C. SARSFIELD, FORMER CHAIRMAN AND
CURRENT DIRECTOR,
SEQUOIA NATIONAL BANK SAN FRANCISCO, CALIFORNIA

DECISION AND ORDER

I. Summary

This is a civil money penalty proceeding against Respondent alleging non-compliance with a Consent Cease and Desist Order. Upon consideration of the entire record, the Comptroller orders Respondent to pay a civil money penalty in the amount of $10,000.

II. Procedural Background

On November 20, 1993, the Office of the Comptroller of the Currency ("OCC") issued a Notice of Assessment of Civil Money Penalties ("Notice") against each member of the Board of Directors ("Board") of Sequoia National Bank, San Francisco, CA ("Sequoia"), alleging noncompliance with a Consent Cease and Desist Order ("Order") dated March 4, 1992. The Notice assessed a civil money penalty ("CMP") for $15,000 against William C. Sarsfield

("Respondent"). Respondent filed an Answer, and requested an administrative hearing pursuant to 12 U.S.C. § 1818(h)(1) and the OCC's Rules of Practice and Procedure, 12 C.F.R. Part 19. On June 7-10, 1994, a hearing was held before Administrative Law Judge Arthur L. Shipe ("ALJ"). OCC was represented by Enforcement Counsel and Respondent by private counsel. On February 3, 1995, the ALJ issued his Recommended Decision ("RD"), in which he recommended a $10,000 CMP. Pursuant to OCC Rules of Practice and Procedure, 12 C.F.R. § 19.39, both Respondent and Enforcement Counsel filed exceptions, and the case was submitted to the Comptroller on March 14, 1995.

III. The Comptroller's Decision

A. Background

When Sequoia was examined as of July 31, 1991, the OCC's examiners found significant deterioration in the bank's overall condition. Because Sequoia's overall condition was determined to be unsatisfactory, the bank was assigned a composite CAMEL rating of 4. RD at 29; Finding of Fact ("FF") 49.[1] Sequoia and the

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[1] "CAMEL" is an acronym for Capital, Asset Quality, Management, Earnings, and Liquidity. CAMEL ratings range from "1" to "5," with "1" being the best rating an institution can receive and "5" the worst. The Uniform Financial Institution Rating System ("UFIRS") is a rating system recommended by the Federal Financial Institutions Examination Council to provide a general framework for evaluating and assimilating all significant financial, operational and compliance factors in order to assign a summary or composite supervisory rating to each federally regulated commercial bank, savings and loan association, mutual

OCC then entered into the March 4, 1992 Order, which document Respondent reviewed and signed. RD at 30; FF 52, 54. The Order required Sequoia's Board of Directors ("Board"), which included Respondent, to:

1) develop plans to maintain adequate liquidity levels (Article VI);
2) reduce reliance on volatile funding sources (Article VII);
3) revise Sequoia's written loan policies (Article IX);
4) develop an adequate loan review program (Article X);
5) develop a program for maintaining an adequate reserve for loan losses (Article XII);
6) maintain up-to-date credit information on borrowers (Article XIII); and
7) maintain Sequoia's Tier 1 capital at eight percent (8%) (Article XV).

Order at 9-16, 19-21, 22.

OCC examiners next reviewed Sequoia as of June 30, 1992. At that examination, examiners concluded that Sequoia was not in compliance with several Articles of the Order, including Articles VI, VII, X, XII, and XIII, and was only partially in compliance with Article IX. OCC Exhibit 12 at A15-A18. At a subsequent OCC

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savings bank and credit union. The purpose of the rating system is to reflect in a comprehensive and uniform fashion an institution's financial condition. compliance with laws and regulations, and overall operating soundness. Use of the UFIRS was approved by the OCC in 1979. (See, OCC Examining Circular EC-159 (REV), dated December 10, 1979.)

examination of Sequoia, conducted as of December 31, 1992, the examiners concluded that Sequoia was not in compliance with Articles VI, VII, IX, X, XII, XIII, and XV. OCC Exhibit 43 at 14-17. Therefore, the OCC issued the Notice.

The ALJ elected to consider Articles VI and VII, both pertaining to liquidity, as a single requirement, thereby reducing to six the total instances of noncompliance he could find. The ALJ concluded that Enforcement Counsel had proved a violation of Articles VI, VII, IX, XII, XIII, but found that Respondent had not violated Articles X and XV. The ALJ recommended a CMP of $10,000. RD at 20, 84-85.

B. Respondent's Compliance with Order's Articles

1. Respondent Did Not Comply With Article VI

Background:

As part of Sequoia's obligations regarding maintenance of an adequate liquidity level, Article VI of the Order required that within 60 days the Board develop a liquidity contingency plan. Order at 10. Specifically, the liquidity contingency plan was to "... identify minimum and maximum liquidity needs and a course of action to meet those needs." Contingencies to be addressed included, but were not limited to: (a) earnings declines; (b) increases in nonperforming assets; (c) potential negative impact of adverse reports by industry analysts; (d) the volume of out-of-area and uninsured deposits; and (e) deposit concentrations. Order at 10-11. The ALJ concluded that Respondent had not complied with Article VI.

RD at 8, 50, 54-55, 57; Finding of Fact ("FF") 152, 173-74, 185.[2]

Respondent excepts to the ALJ's conclusion, arguing that if no contingency plan was put in place, then management, not the Board, is responsible. Moreover, Respondent claims that such a plan was in place not later than August, 1992. Respondent indicates that a consultant's contingency plan of October 30, 1992 was essentially the same plan that Respondent claimed was accepted by the Board some two months earlier. Respondent's Exceptions at 7.[3]

Discussion:

The Comptroller adopts the ALJ's conclusion. Despite Respondent's arguments to the contrary, as a member of Sequoia's Board, and as one who signed the Order, Respondent was obligated to obtain management compliance with the Order's terms, or to secure new management capable of doing so. Moreover, Respondent's claim that Sequoia's contingency plan already was in place by August 1992 is not supported by the record. On October 30, 1992, Sequoia's consultant indicated that "... a contingency plan should be prepared . . . ." OCC Exhibit 28 at 1. Her words clearly indicate that no plan was in place by that date. In fact, no such plan was in place through

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[2] Except as otherwise noted herein, the Comptroller adopts the findings of fact contained in the portion of the ALJ's Decision entitled "Findings of Fact." RD at 20-83; FF 1-312.

[3] Ms. Jeanine Catalano, an employee of the Secura Group, was hired by Sequoia in July, 1992 to provide an independent review of the Bank' s liquidity and volatile liability positions, and to make recommendations regarding same. 1 Transcript of Proceedings in the Matters of William C. Sarsfield ("Tr.") at 86-87.

December 31, 1992. 1 Tr. at 88.

2. Respondent Did Not Comply With Article VII

Background:

Article VII of the Order required the Board within 30 days to adopt and implement a plan, with specific time frames, to reduce the bank's reliance on volatile liabilities through the development of alternative funding sources. Order at 11. The ALJ concluded that despite Sequoia's submitting voluminous reports to the OCC from April 1992 through July 1992, Sequoia's response did not sufficiently specify Sequoia's intended plan, nor did the response adequately discuss the alternative funding sources that the Board would secure. RD at 9.

In his Exceptions, Respondent argues that he did, in fact, adequately respond to this requirement. Specifically, Respondent points out that in its initial response to the Order, Sequoia committed itself to reduce reliance on brokered funds by $2,563,000 by December 1992, and to hold the balance of funds subject to interest rate limits. Thereafter, Respondent notes that by August 31, 1992, Sequoia had reduced volatile liabilities by $4,947,000, nearly $2,400,000 above its target figure. Respondent's Exceptions at 10.

Discussion:

The Comptroller adopts the ALJ's conclusion that Respondent failed to comply with this requirement. The information that Sequoia submitted in response to this requirement failed to conclude how or from what source alternative funding sources would be developed. Also, the plan did not address how the bank would reduce its reliance on volatile liabilities, nor did the plan establish limitations on the use of volatile liabilities as a funding source. OCC Exhibit 12 at A-15.

Moreover, the Sequoia Board failed to address these matters more than 100 days after executing the Order.[4] Furthermore, while the Board reduced the total number of dollars of volatile liabilities on its balance sheets, the Board did not develop alternative funding sources so as to reduce Sequoia's reliance on volatile liabilities as a percentage of overall deposits. Simply, the Board reduced Sequoia's size, but not its relative reliance upon volatile funding sources.

3. Respondent Did Not Comply With Article IX

Background:

Article IX required that Sequoia, within 60 days of executing the Order, review and revise its loan policy. RD at 9-11, 57; FF 188. The ALJ found that Sequoia was not in compliance with Article IX's requirements through December 31, 1992. RD at 10-11, 58-61; FF 193-207. Respondent excepts to the ALJ's conclusion. Initially, Respondent concedes that the Board failed to comply with the requirements of Article IX through the June 30, 1992 examination.

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[4] Moreover, Sequoia had planned since August 1992 to sell $11 million in home equity loans so as to reduce the institution's reliance on volatile liabilities. However, this sale was not consummated by December 31, 1992 because the loan files needed extensive work to make them saleable. OCC Exhibit 45 (Undated, Unsigned OCC Memorandum Re: Sequoia's Liquidity) at 2. Thus, some nine months after the Order was executed obligating Respondent to reduce such reliance, and more than six months after a means was established to reduce such reliance, these loans had not been sold.

Respondent's Exceptions at 11. However, Respondent argues that after June 30, 1992, the OCC agreed that if the Board was to address other, more pressing concerns, the Board had to be permitted to defer revising its loan policy until these other issues had been attended to. Respondent's Exceptions at 11-12. Thus, Respondent appears to be arguing that if the Board failed to comply with the Order's requirement, more pressing matters mitigated this noncompliance. Moreover, Respondent argues that the OCC acquiesced with this noncompliance. Respondent's Exceptions at 11-12.

Discussion:

The Comptroller adopts the ALJ's conclusion that Respondent failed to comply with Article IX. Because Respondent conceded that the Board failed to comply with the requirements of Article IX through the June 30, 1992 examination, and because more than 60 days elapsed between the Order's March 4, 1992 execution date and June 30, 1992, Respondent admits Sequoia's failure to revise its loan policy as per Article IX's requirements.

In support of his position, Respondent claims that Mr. Victor I. Granholm's appointment as Sequoia's acting president in August 1992 precluded Granholm from completing the revision of Sequoia's loan policy. Respondent's Proposed Findings of Fact and Conclusions of Law ("Proposed Findings and Conclusions") at 13; OCC Exhibit 43 at 6-7. However, at the time of Granholm's appointment in August 1992, Sequoia was already in violation of Article IX's 60 day deadline for a new loan policy. Thus, Respondent's contention is without merit.

Moreover, Respondent claims that the OCC acquiesced with the Board's decision to defer the revising of Sequoia's loan policy. However, documentation cited by Respondent, Respondent's Exhibit

WS 11, provides no support for this argument. Accordingly, the Comptroller adopts the ALJ's conclusion that Respondent failed to produce an acceptable revised loan policy as required under Article IX. RD at 10-11; FF 193-207.

4. Respondent Did Not Comply With Article X

Background:

Article X required Sequoia to develop an adequate loan review program within 60 days. RD at 11, 61-62; FF 208. At trial, Enforcement Counsel argued that Sequoia's loan review policy was inadequate because several loans reviewed at the December 31, 1992 examination were downgraded to classifications lower than those assigned by Sequoia. RD at 11. The ALJ indicated that classifying loans is inherently subjective. RD at 12, 70; FF 248. Because Sequoia eventually agreed with the OCC regarding loan downgrades, and because virtually all of the loans downgraded by the OCC eventually were fully repaid, the ALJ concluded that Enforcement Counsel failed to demonstrate a material inadequacy with Sequoia's loan review policy. RD at 12, 70; FF 246, 250.

Enforcement Counsel excepts to the ALJ's conclusion. Enforcement Counsel argues that the ALJ erred in his conclusion regarding Sequoia's compliance with Article X because the ALJ gave substantial weight to Respondent's evidence that virtually all of the loans downgraded by the OCC eventually were fully repaid. Enforcement Counsel's Exceptions at 13.

Discussion:

The Comptroller reverses the ALJ's conclusion.[5] Even if Sequoia eventually agreed with the OCC regarding loan downgrades, and even if the loans downgraded by the OCC eventually were fully repaid, that simply would not exonerate the Board from failing to properly classify its loans in the first place. Article X of the Order required the Board, within 60 days, to formulate and implement an effective loan review program, which program was to assure timely identification of problem loans in Sequoia's loan portfolio. Order at 15. Sequoia hired an outside consultant, JRC Associates, to conduct loan

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[5] The ALJ's Decision states that "Sequoia did not violate Article X of the Consent Order, as its loan review policy made good faith, reasonable efforts, at detecting credit risk within the portfolio." RD at 70; FF 246 (citing OCC Exhibit 12 at A-16). A review of OCC Exhibit 12, and in particular pages 2 and A-16 of same, supports a different conclusion from that reached by the ALJ. On page Ao16, the OCC examiners concluded that Sequoia was not in compliance with Article X's requirements because "[t]he Board did not implement an effective loan review program within 60 days. An external loan firm was engaged to perform this function. However, the first review was postponed because it . . . was planned concurrently with our examination." OCC Exhibit 12 at A-16. Moreover, on page 2 of this exhibit, the examiners informed the Board that "[l]oan portfolio supervision is extremely poor and has not improved. Poor underwriting and loan supervision practices continue." OCC Exhibit 12 at 2. Such language belies Respondent's claim that he made a good faith, reasonable effort at portfolio supervision.

reviews in July and December, 1992.
Clearly, Sequoia did not meet the 60 day deadline to which it had committed itself. RD at 67; FF 231.

A loan review program is effective if it accurately grades the loans in a bank's portfolio so that problem loans and associated credit risk and loss potential may be identified. 1 Tr. at 177. As evidenced by the findings at the December 31, 1992 examination, the Bank's loan review program failed to properly grade and identify problem loans at that time. During this examination, the OCC's examiners downgraded 10 of the 41 loans that were reviewed, which loans totalled $2,565,000. 1 Tr. at 179; OCC Exhibit 127.

Additionally, while Sequoia may have eventually agreed to downgrade certain loan classifications, Respondent delayed compliance. For example, a meeting was held between OCC representatives and various Board members on October 23, 1992 at which a $423,000 loan was discussed. 1 Tr. at 57; Respondent's Exhibit WS 1. The OCC insisted that this loan be charged off. OCC Exhibit 36 at 4. The majority of the Sequoia Board was convinced by Respondent and Sequoia's president to delay such action. The record shows that because of advice received from Respondent, Director Granholm did not recommend to the Board that this loan be charged off. OCC Exhibit 140 at 36.[6]

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[6]Moreover, the fact that a classified loan is subsequently repaid does not alter the fact that it had been subject to a risk of nonpayment. The Comptroller has specifically ruled that an examiner's determination, based on his experience and training, that a loan fails to satisfy accepted standards of prudent banking operations, cannot be measured by subsequent events.

5. Respondent Did Not Comply With Article XII

Background:

Article XII of the Order required that the Board maintain written documentation indicating the factors considered and conclusions reached by the Board in determining the adequacy of the Allowance for Loan and Lease Losses ("ALLL"). Order at 19-20. The ALJ concluded that Board failed to comply with this requirement, despite having submitted monthly ALLL reports to the OCC, because none of the reports submitted clearly explained the methodology employed in arriving at Sequoia's loan loss reserve. RD at 13, 71-80; FF 251-96. Respondent excepts, arguing that these monthly reports, labelled Respondent's Exhibits WS 1-6, gave a detailed analysis of both the methodology underlying Sequoia's ALLL calculations, as well as substantiation for the loss factors Sequoia employed.[7] Respondent's Exceptions at 12- 13; Respondent's Brief at 19.

Discussion:

The Comptroller adopts the ALJ's conclusion. A review of the

Thus, the fact that a loan is ultimately repaid does not affect the validity of the examiner's determination of the risk of nonpayment. In re Lakeside Nat'l Bank, No. AA-SW-90-165, 11-12 (May 8, 1992). The Comptroller concludes that the ALJ should not have considered the ultimate disposition of the loans in question, and that Enforcement Counsel proved by a preponderance of the evidence that Respondent violated Article X.

[7] A loss factor is a percentage that is a multiplied by the total dollar amount of a pool of loans so as to provide an estimate of the loss potential for those loans. 1 Tr. at 200.

above referenced monthly reports does not reveal any detailed analysis of the methodology underlying Sequoia's loan loss reserve calculation. The Order specifically required that Sequoia's program for calculating its ALLL should be developed and implemented consistent with Banking Circular # 201 and Section 217 of the Comptrollers Handbook for National Bank Examiners. Order at 19. In fact, Respondent's explanation of the methodology underlying its ALLL calculation did not establish how Sequoia's ALLL calculation was consistent with, or indeed, whether Sequoia even considered, Banking Circular # 201 and the Comptroller's Handbook.

An effective program for the maintenance of an adequate ALLL requires that the institution accurately grade or risk rate its loan portfolio. Moreover, the bank must use a reasonable loss factor. RD at 71; FF 253. Sequoia did neither.

With regard to proper risk rating of Sequoia's portfolio, Respondent claims that the OCC simply cannot understand Sequoia's methodology because of the institution's history of no loan losses prior to 1992. Respondent's Exceptions at 12-13. However, rather than supporting Respondent's claim that Sequoia properly calculated its ALLL, Sequoia's history of no recognized loan losses prior to 1992 stands as a strong indication that Sequoia was not properly recognizing bad credits in its portfolio. In fact, the Order became necessary precisely because Sequoia's loan classification system was faulty.[8]

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[8] An example of Sequoia's inability to recognize bad credits is the California Properties loan. California Properties involved a second mortgage position on a hotel. 1 Tr. at 180. The property's cash flow was insufficient to service the Sequoia loan, and the borrower was unable to

Moreover, with regard to its use of loss factors, Sequoia's methodology again was deficient. Sequoia's ALLL policy neither explained nor supported the percentages employed as loss factors. RD at 73; FF 263; 1 Tr. at 202. Finally, the problems with methodology were not abated within a reasonable time frame. Sequoia's ALLL methodology was inadequate and its loss factors unsupported through the December 31, 1992 OCC examination of Sequoia. RD at 79; FF 294; 4 Tr. at 757. [9]

6. Respondent Did Not Comply With Article XIII

Background:

Article XIII of the Order required that Sequoia's Board obtain

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cure severe delinquencies on the first deed of trust, real estate taxes, and on a ground lease. Moreover, in the event that foreclosure was initiated by the first lien holder, Sequoia was not in a position to take out that loan because of its size. Therefore, Sequoia's position effectively was unsecured. Respondent's Exhibit WS 1. Despite this, Sequoia classified this credit as substandard. 1 Tr. at 184.

[9] In calculating its ALLL, Sequoia apparently relied heavily upon a Journal of Commercial Lending article. See Respondent's Exhibit WS 1, referencing Eric Weinstein, ALLL Things Considered: Evaluation of the Adequacy of the General Reserve for Loan Loss. Journal of Commercial Lending, Feb. 1992 ("Weinstein") at 6. However, if anything, this article actually undercuts Respondent's claim that its ALLL methodology was necessarily complex because Sequoia had not taken a loss prior to 1992. The article's author pointed out that historical loss experiences are fictitious and should not be used in calculating a bank's reserves. Weinstein at 14.

current and satisfactory credit information for all loans lacking such information. Order at 20. The ALJ concluded that Respondent failed to take reasonable efforts to obtain updated financial information regarding these loans, but that Respondent's inaction was merely technical in nature. Still, the ALJ found Respondent's non-compliance sufficient to warrant imposing a CMP. RD at 15-16: see also RD at 80; FF 298.

While Respondent concedes that he failed to live up to the letter of the Order, Respondent excepts from the ALJ's conclusion that such technical noncompliance can be a sufficient basis for imposing a CMP. Respondent's Exceptions at 13-14. Enforcement Counsel also excepted, arguing that Respondent's failure to comply with Article XIII was a substantial act of noncompliance with the Order's requirements. Enforcement Counsel's Exceptions at 10-12.

Discussion:

The Comptroller agrees with the ALJ that Sequoia violated Article XIII, although the Comptroller believes that the violation was more than technical. Respondent's own testimony establishes that his noncompliance cannot be viewed as a minor breach of the Order, but rather was substantial and intentional. See RD at 15; 2 Tr. at 466-67.

7. Respondent Did Not Comply With Article XV Background:

Article XV of the Order required Sequoia to maintain an eight percent Tier 1 capital level. Order at 22. Sequoia's Tier 1 capital requirement dropped slightly below this target figure for approximately the first five months of 1993, but the ALJ concluded that this was caused by an OCC imposed valuation change. RD at 83; FF 310. The valuation change at issue concerned Sequoia's overstating of the value of excess servicing fee receivables based on assumptions not supported by industry

practice. OCC Exhibit 12 at A-12. The ALJ noted that Sequoia had met the required capital figure prior to the valuation change being imposed on it, and after the valuation change was imposed, Sequoia took the steps necessary to restore the capital account to the desired level. RD at 16-17, 83: FF 310. Therefore, the ALJ concluded that Respondent did not violate Article XV. RD at 17; FF 311.

Enforcement Counsel excepts, arguing that Respondent was on notice as of the June 30, 1992 examination that the valuation change might be imposed. Moreover, Enforcement Counsel excepts to the ALJ's finding that Sequoia restored the capital account to the desired level after the valuation change was imposed. Enforcement Counsel argues that because the capital level was deficient as of December 31, 1992, a subsequent increase in same does not undo the existence of a prior violation. Enforcement Counsel's Exceptions at 20-21.

Discussion:

The Comptroller reverses the ALJ's conclusion that Respondent did not violate Article XV because Respondent had ample notice that the valuation change could be imposed. Moreover, Respondent's subsequent sale of assets over five months to "cure" the violation does not mean that no violation occurred in the first place. RD at 83; FF 310.

Respondent knew nearly five months in advance that the relevant write off might be required. With the OCC having completed an examination of Sequoia as of June 30, 1992, a meeting was held on August 5, 1992 between OCC representatives and Sequoia personnel to discuss the examination's conclusions. Raymond Sander, the OCC bank examiner in charge of the Sequoia examinations, testified that Respondent was present at that August meeting at which Sequoia's management was made aware that the OCC questioned the value assigned to these fees.

Moreover, Sander testified that Respondent was made aware that this valuation would again be considered at the December, 1992 meeting. 3 Tr. at 731-32; RD at 38-39; FF 92-93.

Furthermore, the examination report itself indicated that because Sequoia used assumptions unsupported bv industry practices to value the excess servicing fees at issue, the value attributed to these excess fees was overstated, and therefore Sequoia's capital position necessarily was overstated as well. OCC Exhibit 12 at A-12. A logical corollary to such a conclusion is that Sequoia would ultimately have to substantiate the contrary-to-market assumptions underlying the value assigned to these fees, or write the fees down to a market level. Finally, with regard to the ALJ's Finding of Facts (FF 310, 311) - specifically, that because Sequoia sold certain assets in order to cure the capital deficiency, Respondent therefore was not in violation of the Tier 1 capital requirement - Respondent still cannot be excused from responsibility for noncompliance with Article XV. [10]

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[10] Additionally, while not directly on point, the bank was put on notice via the June 30, 1992 Summary of Condition that Sequoia's capital levels generally were considered marginal, and that anticipated losses going forward would further erode its capital position, which could result in violations of the minimum capital standard. OCC Exhibit 12 at A-4. An argument can be made that Sequoia should have been prepared for an erosion in its capital base, if not from the required write off of the servicing fee receivables, then from anticipated loan losses. Had Sequoia taken steps to boost its capital position in anticipation of those loan losses, then Sequoia still might have been able to maintain the required Tier 1 capital level despite the write down in the receivables' value.

IV. Amount of Civil Money Penalty

Section 1818(i)(2) of the Federal Deposit Insurance Act provides that any institution-affiliated party who violates any written agreement between the depository institution and its regulatory agency shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues. 12 U.S.C.A. § 1818(i)(2)(A) (1994). Because Respondent is an institution-affiliated party, and because Respondent has been determined to have violated the Order, a civil money penalty may be imposed on Respondent. In calculating the CMP, certain factors must be considered. Specifically, the agency must consider "(i) the size of the financial resources and good faith of the insured depository institution or other person charged; (ii) the gravity of the violation; (iii) the history of prior violations; and (iv) such other matters as justice may require." 12 U.S.C.A. § 1818(i)(2)(G) (1994).

As discussed above, the Comptroller adopts most, but not all, of the ALJ's Findings of Fact and Conclusions of Law. The Comptroller does not adopt the ALJ's findings and conclusions that: (1) Respondent did not violate Articles X and XV of the Order: (2) Respondent demonstrated good faith in attempting to comply with the Order; and (3) Respondent's violations of Articles VI, VII, IX, X, XII, and XIII were merely technical. Nonetheless, as discussed below, the Comptroller adopts the ALJ's recommendation that a $10,000 CMP be imposed on Respondent.

A. Respondent's Financial Resources

Respondent's financial resources are not at issue in the instant action. Respondent has stipulated that he has adequate funds to pay a $10,000 CMP. RD at 19; Joint Exhibit at 1.

B. Respondent's Good Faith

Respondent's good faith is at issue. The ALJ concluded that Respondent exhibited good faith in attempting to comply with the Order's requirements, a conclusion that Enforcement Counsel strenuously objected to. RD at 19; Enforcement Counsel's Exceptions at 1-3, et seq. In the Comptroller's view, Respondent's extensive work experience and knowledge base must be considered in evaluating his good faith.

Respondent is not a neophyte in the banking world. Having worked as a commissioned National Bank Examiner, having held responsible positions at major banking institutions, having formed and operated two different banks, and having taught banking law at a local university, Respondent must have known what was required of him in order to achieve full compliance with the Order's requirements. 2 Tr. at 271-74. Therefore, Respondent's failure to implement the Order's requirements is a matter of concern to the Comptroller and suggests a lack of good faith by Respondent.

Moreover, as discussed above, some of Respondent's actions suggest intentional noncompliance with some of the Order's mandates. For example, Sequoia did not adopt a liquidity contingency plan. Respondent doubtless knew this, and despite such knowledge, insisted that such a plan was in place. See supra text at 4-5. Additionally, Respondent was obligated to secure up-to-date credit information from existing borrowers. Respondent testified that, in some cases, he actually dictated to subordinates that they not ask borrowers for said information. RD at 15;2 Tr. at 466-67.

Finally, Respondent's own testimony -- claiming that management, not the Board, was responsible for any noncompliance; asserting that despite his position in the Board's majority faction, he could not accomplish anything; arguing that he could not reasonably have anticipated that the overvalued servicing fee receivables would have to be written down; noting that the potential of lender liability suits precluded him from asking borrowers to provide up-to-date financial information; asserting that Sequoia's president had insufficient time in his day to be able to revise Sequoia's loan policy, and that subsequent collection of classified debt excuses incorrect classifications -- lacks credibility, given Respondent's own credentials, leading to the conclusion that his noncompliance with the Order's

requirements does not evidence good faith.

C. Gravity of Respondent's Violations

Under § 1818(i)(2)(G), the agency must consider the gravity of the violations involved. Respondent's failure to adhere to seven of the Order's Articles indicates the existence of a very serious problem. However, while the Comptroller reverses the ALJ's conclusion that Respondent complied with Articles X and XV of the Order, Sequoia's 1992 loss was caused by nonperforming loans, which loans predated the Order's signing. Nothing in the record indicates that Respondent's compliance with the Order's terms, and specifically with Articles X and XV of the Order, would have avoided the loss. Therefore, the Comptroller does not believe that Respondent's failure to comply with Articles X and XV warrants increasing the ALJ's recommended CMP of $10,000.

D. Sequoia's History of Prior Violations

Under § 1818(i)(2)(G), Sequoia's history of prior violations also should be considered. Problems addressed in the Order such as unreasonable reliance on volatile funds, an unacceptable ALLL, and inadequate loan portfolio supervision, were first cited by the OCC in its February 29, 1988 examination of Sequoia. RD at 3-4. The March 31, 1990 examination concluded that many of the problems cited in the

prior year's examination had not yet been addressed. RD at 4. These same problems were again cited in the 1991 report of examination. Thus, despite the passage of more than three years, the problems cited in the February 1988 examination still troubled Sequoia in 1991. As a result of the July 1991 examination's findings, Sequoia and the OCC entered into the March 4, 1992 Order. RD at 4-5.

E. Other Factors

Finally, in determining whether to impose a CMP, § 1818(i)(2)(G) permits the Comptroller to consider other matters as required in order to achieve a just result. In these proceedings, Respondent seeks consideration of two matters. The first involves a claim of collusion; the second is Respondent's claim that a schism within the Board undermined his efforts to comply with the Order.

Regarding the claim of collusion, in his Exceptions Respondent claims that collaboration between Sequoia Board member John F. Henning, Jr. and Enforcement Counsel culminated in a deal pursuant to which the OCC reduced its civil money penalty assessments against Henning and Peter Bolles, another Sequoia Board member, in exchange for their testimony before the ALJ. Respondent's Exceptions at 2. Moreover, according to Respondent, Enforcement Counsel surreptitiously made available to Henning unredacted copies of OCC

Reports of Examination and other documents for use against Respondent in a civil action brought by Sequoia shareholders. Respondent's Exceptions at 3. Therefore, Respondent argues that the ALJ should never have permitted Henning and Bolles to testify, nor should the ALJ have admitted into evidence documentary evidence they prepared. Id. at 2.

There is insufficient evidence in the record to support Respondent's claim of collusion. In attempting to establish the existence of the collusion, Respondent relied heavily upon testimony elicited during his cross examination of Henning. 4 Tr. at 797-99, 803-06, 808-10. However, the testimony that Respondent elicited during his cross examination of Henning was uncorroborated. As it went unaddressed in his Recommended Decision, the ALJ apparently concluded that Respondent's collusion argument was meritless. Similarly, the Comptroller considers the evidence brought out by the cross examination, and concludes that Henning's uncorroborated statements cannot be relied upon. More importantly, even assuming, arguendo, that Respondent's self-serving collusion claim is credible, that fact does not excuse Respondent's noncompliance with the Order.

The second matter concerns Respondent's claim that his efforts at complying with the Order's requirements were undermined by other

Board members. Initially, it should be noted that between June 30, 1992 and December 31, 1992, two distinct factions arose within the Board. OCC Exhibit 43 at 7. Moreover, the dispute became so antagonistic that various members of the Board made criminal referrals regarding other Board members, including Respondent. OCC Exhibit 43 at 7. Because of the existence of this schism, Respondent claims that the ALJ erred in finding him culpable for Sequoia's noncompliance with the Order.

Moreover, Respondent claims that after August 1992, he no longer was actively involved in Sequoia's management. As such, he seeks to hold the management that was in place accountable for failing to implement his so-called Sarsfield Action Plan, a plan that he indicates would have addressed compliance with Article XV. In so arguing, Respondent seeks to undermine the ALJ's conclusion that Respondent dominated Sequoia's Board of Directors. Respondent's Exceptions at 6; see also, RD at 23; FF 17.

In support of his claim that other Board members undermined his efforts at achieving compliance with the Order, Respondent references language found within Enforcement Counsel's Prehearing Statement. Specifically, Respondent claims that the OCC admitted that the minority faction on Sequoia's Board acted as a roadblock when the

majority attempted to bring about change at Sequoia. Respondent's Exceptions at 3-4. However, by neglecting to include other language contained within it, Respondent changes the meaning that Enforcement Counsel sought to convey in the Prehearing Statement. The Statement plainly indicates that the entire Board, including Respondent, the presence of factions notwithstanding, was responsible for achieving the Order's requirements. Enforcement Counsel's Prehearing Statement at 10-12.

Moreover, Respondent was a member of the majority faction, and according to Respondent's own testimony, the majority Board members always had the ability to outvote the Board's minority. 3 Tr. at 542-47. Finally, as a director of Sequoia, Respondent was at all relevant times an institution-affiliated party under 12 U.S.C. §§ 1813(u) and 1818(i), and had a statutory and fiduciary duty to ensure Sequoia's compliance with the Order. Therefore, even if Sequoia's board meetings were acrimonious, as a matter of law Respondent still was obligated to obtain Sequoia's compliance with the cease and desist order, or take actions designed to bring about that result, such as seeking out new management for the bank.

With regard to Respondent's claim that he no longer was involved in Sequoia's management after August, 1992, Respondent

served as Sequoia's senior executive officer for those several months after the Order was executed within which compliance with most of its requirements was required. Moreover, even though he eventually resigned from his position as Sequoia's senior executive, Respondent remained Sequoia's Chairman of the Board through January, 1993. OCC Exhibit 21; OCC Exhibit 43 at 7.[11] Furthermore, an attorney employed by Sequoia concluded that Respondent was involved in Sequoia's daily management through at least December 14, 1992. OCC Exhibit 37 at 2. Finally, even if Respondent no longer was an active member of Sequoia's management, and did not dominate the Board, Respondent still was obligated to obtain Sequoia's compliance with the Order. If he was unable to accomplish that, then he should have taken appropriate alternative actions, including attempting to secure new management willing to comply with the Order's terms.

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[11] Sequoia's Summary of Condition as of December 31, 1992 also indicates that despite Respondent's resignation as an executive officer, his dominant decision making position and active participation in Sequoia's daily activities led examiners to conclude that he was an executive officer for purposes of Regulation O, at 12 C.F.R. Part 215. OCC Exhibit 43 at 7.

V. Order

Based upon the entire record of the proceedings, the pleadings, the ALJ's Decision, Exceptions to the Decision filed by both Respondent and Enforcement Counsel, and for the reasons set forth in the Accompanying Decision, the Comptroller hereby orders Respondent to pay a civil money penalty in the amount of $10,000.

IT IS SO ORDERED this 21st day of July, 1995.

/s/ Eugene A. Ludwig

Comptroller of the Currency

[Rec. Mar. 8, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM S. SARSFIELD, Former Chairman of the Board and
Current Director;
KENT D. GLOVER, Former President and Current Director;
CHARLES PUCCINELLI,
PETER P. BOLLES, THOMAS J. NIEDERMEYER, SR., and
RICHARD C. VAN VALER,
All Former Directors; JOHN F. HENNING, JR., and NORMAN I. KRUG,
Current Directors,
of SEQUOIA NATIONAL BANK, San Francisco, California

EXCEPTIONS TO ADMINISTRATIVE LAW
JUDGE'S RECOMMENDED DECISION BY
RESPONDENT WILLIAM C. SARSFIELD;
DECLARATION OF MICHAEL W. McCANN

Respondent respectfully submits the following exceptions to the Recommended Decision of Arthur L. Shipe, Administrative Law Judge, filed herein on or about February 3, 1995.[1]

EXCEPTION NO. 1:

Exception is taken to the Court's denial of Respondent's Post-Hearing Motion to Strike Section II of the OCC's Reply Brief, and the Court's acceptance of and reliance upon the testimony of, and documentary evidence prepared by, OCC witnesses HENNING and BOLLES. (ALJRD, p.2, fn.1.)

SUPPORTING EVIDENCE AND ARGUMENT

Respondent incorporates herein his previous argument and citation to evidence demonstrating the personal vendetta engaged in my Henning, in collaboration with the OCC, to force Respondent out of management of the Bank. (ROB 2:6-4:16; Respondent's Reply Brief (hereinafter "RRB") at p.2:11-3:8).

To summarize, this collaboration between Henning and the OCC culminated in a "deal" being struck between Henning and OCC counsel, pursuant to which the OCC reduced the civil money penalty assessment against Henning and Bolles to $950 in exchange for their previous

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[1] All citations to the Recommended Decision are by reference to the page and paragraph and will be preceded by the abbreviation "ALJRD"; references to exhibits introduced into evidence by the OCC will continue to be identified as "OCC 1", et seq.; citations to Respondent's exhibits will continue to be referenced as "WS 1", et seq.; citations to testimony at the trial on June 6-10, 1994 will continue to be referenced by page and line number and the abbreviation "TP"; citations to Respondent's Opening Brief are referenced as "ROB".

collaboration and trial testimony. Respondent continues to respectfully contend that all testimony of, and documentary evidence prepared by, Henning and Bolles is incompetent and should not be considered.

As further evidentiary support for this argument, Respondent refers to Exhibit 1 attached to the accompanying declaration of Michael W. McCann. Exhibit 1 is a true and correct copy of excerpts of a deposition given by John F. Henning on November 16, 1994 in San Francisco Superior Court Action No. 950665, which is a shareholder's derivative suit against Respondent and other directors of Sequoia National Bank. In Exhibit 1, Henning admits that following his testimony in these proceedings (in June of 1994) and finalization of the settlement agreement between Henning and the OCC, the OCC (through Attorney Bloise) surreptitiously and gratuitously made available to Henning unredacted copies of the OCC Reports of Examination, along with other documents, to be used against Respondent in the San Francisco Superior Court action. (See Exhibit 1, pp. 573:21-578:25.)

This evidence of the continuing collaboration between Henning and the OCC, now carried over into a continuing attack on Respondent in the context of other litigation in which Respondent is a defendant, dramatically demonstrates the misconduct of the OCC in these proceedings and the reason why the testimony of, and documentary evidence prepared by, Henning and Bolles upon which the OCC's case so heavily depends, must be stricken.

EXCEPTION NO. 2:

Exception is taken to the Court's statement that

". . . the minority faction of the board genuinely wanted to achieve

compliance with the consent order...." (ALJRD p.7, second full paragraph.)

SUPPORTING EVIDENCE AND ARGUMENT

In its own Pre-Hearing Statement the OCC admitted that the minority faction on the bank's Board ". . .acted as a roadblock . . . taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices . . . the minority group . . . equated anything that was beneficial to the majority group with a detriment to the Bank . . . the primary duty of the minority group directors during the period of non-compliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the board." (Emphasis added; ROB 3:8-20; OCC Pre-Hearing Statement pp. 10-11.)

The significance of this issue has to do with the allegations by the OCC (endorsed at least in part by the Court in its Recommended Decision), that the Board somehow delayed or prevented implementation of recommendations made by the liquidity consultant (Catalano) retained in July of 1992. While Respondent denies this allegation (see Exception No. 3 below), even if true any resulting non-compliance is attributable to the members of the minority faction of the Board (Henning and Bolles), not Respondent. This conclusion is further corroborated by the candid admissions of OCC examiners Ragus and Sander that, after August of 1992 Respondent was "no longer involved in management" and not "involved with the Compliance Committee or compliance with the Consent Order". (See ROB 5:17-22; TP 104:19-22; TP 152:20-25; TP 233:5-8; TP 734:23-735:2.)

EXCEPTION NO. 3:

Respondent takes exception with the Court's statement that: "The various board members . . . could not agree on the implementation of these recommendations [by liquidity consultant Catalano]. After considerable debate, the majority faction of the board (to which Respondent Sarsfield belonged) rejected the consultant's recommendations (advocated by the minority faction), and implemented the institution's own liquidity plan." (Emphasis added; ALJRD p.8, first full paragraph.)

"While the plan ultimately implemented by the board may have had the effect of increasing liquidity levels, it clearly did not set forth a sufficient contingency plan which was expressly required by the Consent Order." (ALJRD p.8, second full paragraph.)

"[T]he issue is whether the board implemented a satisfactory contingency plan as required by the OCC Order, and it is my conclusion . . . that the board did not, thereby failing to comply with Article VI of the outstanding Order." (ALJRD p.8, third full paragraph.)

Respondent further takes exception to Findings of Fact ("FOF") Nos. 4-17, 117, 119, 123, 142, 144, 145, 146, 147, 148, 149, 151, 152, 153, 155, 161, 162, 163, 164, 167, 172, 174, 179, 181, 182, 183, 184, 185, 186 and 187.

SUPPORTING EVIDENCE AND ARGUMENT

In essence, the OCC argued and the Court has found that:

1. After September of 1992, Respondent dominated the Board;

2. The Board "rejected the consultant's [Catalano] recommendations (advocated by the minority faction), and implemented the institution's own liquidity plan" (ALJRD p.8, first full paragraph); and

3. The Board did not implement a satisfactory contingency

plan as required by the OCC Order.

As a preliminary matter the assertion that Respondent "dominated the Board" after his withdrawal from active participation in bank management in August of 1992 is simply not supported by any evidence in the record. To the contrary, OCC examiners Ragus and Sander both admitted at the trial that the exact opposite was the case, i.e., that Respondent was "no longer involved in management after August 1992 (TP 734:23-735:2), and that Respondent was not "involved with the Compliance Committee or compliance with the Consent Order" (Emphasis added; TP 104:19-22).

Secondly, these proposed findings ignore the fact that implementation of Catalano's recommendations was a management function (i.e., acting President Granholm), not the Board or Respondent. In fact, the recommendations regarding liquidity management (including the liquidity contingency plan) formulated by Catalano essentially reiterated what Respondent had put in his recommendations which he had presented to and persuaded the Board to adopt in August of 1992 (WS 37, last two pages; OCC 62, p. 2).

Moreover, the assertion that the Board rejected Catalano's recommendations is not supported by the record. At the October 28, 1992 Board meeting, it was "recommended that the Bank continue to strictly adhere to the policy of eliminating brokered accounts, and identified the need for the Board to adopt a strategy for increasing core deposits." (OCC 27, p.3, section 3.7); improvement in the methodology by which management reported on liquidity to the board to respond to OCC criticisms was discussed (OCC 27, p.3, section 3.7); "Board members commented that management and Catalano should work together to endorse one program of reporting the Bank's liquidity position to the Board" (OCC 27, p.4).

At the October 30, 1992 Compliance Committee meeting, Catalano commented that the existing asset/liability policy of the Bank "was a good program", but needed to be updated. Granholm agreed. OCC 28, p.1, section 1.1.)

At that same meeting Bolles (a member of the Board and the Compliance Committee) met with Catalano "to discuss her ongoing relationship with the Bank, her new position with the Secura Group, and the possible need for the Committee and Catalano to provide the Board with more definitive reports." (OCC 28, p.2, section 5.0.)

At the November 24, 1992 Board meeting, the Board discussed the fact that the OCC wanted Bank management to report the Bank's liquidity position to the Board utilizing the methodology recommended by Catalano and the Board took appropriate action to ensure compliance with the OCC's position on the matter. (OCC 33, p.8, paragraphs 2 and 3.) With respect to a contingency plan in the event of a liquidity "emergency", the Board noted that such a plan had been adopted in August of 1992 pursuant to the recommendations of Respondent. (OCC 33, p.8, para. 4.) Bank management (i.e., not Respondent) was directed to prepare "a contingency liquidity plan for Board review at the upcoming December 16, 1992 meeting. (OCC 33, pp.8-9.)

At the December 16, 1992 Board meeting, director and president Granholm was forced to leave the meeting at 5:00 p.m. due to a family emergency (OCC 38, p.7). However, in Granholm's absence the Board still proceeded with the liquidity contingency plan and liquidity report that Granholm had prepared. (OCC 38, p.7.) With respect to anticipated liquidity requirements coming up in 1993 (due to maturity of large CD's), Respondent noted that there was in existence a contingency plan to sell loans and equity line accounts. Respondent further reminded the Board

that Laughlin National Bank was a prospective purchaser of commercial real estate loans, if that need also arose. (OCC 38, p.7.) Respondent had first devised and implemented this liquidity contingency plan in his April 8, 1992 first monthly report to the OCC. (WS 1, pp. 7-13, specifically p. 13.)

Although the OCC criticized the Bank for not executing its liquidity contingency plan by selling the loans in question before December 31, 1992 (FOF 177), that was never a requirement of the Consent Order. In fact, by the OCC's own admission, these loans were sold in early 1993 well in advance of the maturity date of the large CD's which Respondent had correctly anticipated all the way back in April of 1992 would create the need for increased liquidity to be supplied by sale of these loans.

To summarize, Respondent devised the liquidity contingency plan as early as April of 1992, caused the Board to formally adopt the adopt the plan in August of 1992, and the Board implemented the plan in early 1993 well in advance of the need to increase its liquidity caused by the maturing large CD's. The Bank's alleged "failure" to sell the loans prior to December 31, 1992 was never a requirement of the Consent Order. In fact, selling the loans earlier than the Bank did (i.e., in 1993) would have been an unnecessary dissipation of profit producing bank assets months in advance of the need to do so.

Moreover, there is absolutely no evidence in the record that the Board ever "rejected Catalano's recommendations". To the contrary, OCC 27, 28, 33, 38, 62 and WS 1 and 37 all conclusively demonstrate that Respondent formulated the required liquidity contingency plan, consultant Catalano adopted that liquidity contingency plan in her own recommendations, after September of 1992 management continued to

work with Catalano and the Compliance Committee to implement that plan, and the plan was in fact executed in early 1993 concurrent with the maturation of the large CD's that Respondent had identified all the way back in April of 1992 as the triggering event for the liquidity contingency plan.

EXCEPTION NO. 4:

Respondent takes exception with the Court's conclusion that, with respect to Article VII (Bank Reliance on Volatile Liabilities) ". . . The information submitted ... does not ... sufficiently specify the board's intended plan, nor does it contain adequate discussion of the alternate means by which the board intends to remedy the cited concern." (ALJRD p. 9, second full paragraph.) Respondent also takes exception to related FOF Nos. 186 and 187.

SUPPORTING EVIDENCE AND ARGUMENT

In his initial report following execution of the Consent Order, Respondent specifically addressed the concerns in Article VII, and set forth the Bank's plan for reducing its reliance on volatile liabilities. (WS 1, p. 49-50, "March 30, 1992 Volatile Funds"). On page 50 of WS 1, Respondent set forth the "Plan": (1) to reduce reliance on brokered funds by $2,563,000 as of December 1992 and (2) and to hold the balance of funds subject to interest rate limits.

On September 3, 1992 Respondent prepared a report for the Board entitled "Deposit and Liquidity Report". (WS 18.) In this report, it was reported that CD's had been reduced from a March 31, 1992 balance of $32,831,000 to an August 31, 1992 balance of $27,884,000. (WS 18, p. WS 00017) Thus, not only had Respondent specified the Board's intended plan in April of 1992, his report to the Board in September of 1992 demonstrated that by August of 1992 the Bank more than accomplished

the plan objective and had been able to reduce "volatile liabilities" almost $2.4 million more than the goal for December of 1992 set forth in the April 1992 plan.

EXCEPTION NO. 5:

Respondent takes exception to the Court's statement that ". . . [F]urther concerted effort was required on numerous provisions [of the loan policy], and the proposal set forth by the board did not sufficiently comply with the requirement of the outstanding Order. (Emphasis added; ALJRD p.11, first partial paragraph.) Respondent also takes exception to related FOF Nos. 81 and 191-207, inclusive.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent concedes the accuracy of and would not take exception to any of the above material if it were limited to the period covered by the Examination of June 30, 1992. However, Respondent does take exception to the Court's conclusion and related findings of fact because they ignore the uncontested and undisputed evidence at trial that the OCC agreed after the June 30, 1992 Examination that the Bank could and should defer the final revisions to its written loan policy to enable acting president Granholm to focus on other more critical issues. (See ROB 11:9-14:21, and especially the material at ROB 13:9-17, and the portions of the transcript cited therein and WS 11.)

This prioritization and deferral of the final revisions to the Bank's written loan policy from August 1992 through December 1992 was specifically and expressly agreed to by the OCC. The OCC offered no denials or contrary evidence whatsoever at the trial on this issue. It is also uncontroverted that in December 1992 Mr. Granholm did submit the previously deferred final revisions to the Bank's written loan policy, and the Board adopted those revisions and the OCC approved them in early

1993.

It is thus beyond despite and cannot be controverted, that after June 30, 1992 the deferral of the final required revisions to the Bank's written loan policy was specifically acquiesced in by the OCC. Consequently, the OCC is estopped from asserting otherwise in these CMP proceedings.

EXCEPTION NO. 6:

Respondent takes exception to the Court's conclusions that the monthly reports prepared by Respondent did not ". . . [c]learly explains the methodology employed in arriving at these various standards [ALLL] . . . . [T]he board did not set forth ... a satisfactory explanation for the amount of allowance allocated for the various assets within the portfolio." (ALJRD p.13, paras. 3 and 4.) Respondent also takes exception to related FOF Nos. 257, 258, 259, 263, 267-271, inclusive, 273, 276, 279-290, inclusive, 293 and 296.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent incorporates herein by reference his argument and earlier citations to evidence contained in ROB 18:8-21:8.

It has been conceded by the OCC, and determined by the Court, that the Bank's methodology by which it determined ALLL, and the Bank's ALLL itself, were adequate throughout 1992.

It is also undisputed that, because of the Bank's uniquely excellent history of no loan losses prior to 1992, the Bank (and Respondent) were placed in the ironic paradox of having to develop a methodology for determining ALLL that was itself, by definition, necessarily unique, and therefore much more complex than that of a bank with a less successful record of prior loan losses. (ALJRD pp. 13-14.)

In light of these uncontroverted facts, the OCC is in the final analysis, reduced to contending only that Respondent's explanation of this admittedly unique and complex methodology was unsatisfactory, as the examiners apparently did not understand the methodology and respondent's explanation. The Court has determined that the OCC's inability to understand the methodology is a sufficient basis for assessing a CMP, notwithstanding the uncontroverted fact that the methodology was adequate and the resulting ALLL proven more than sufficient.

Respondent respectfully submits that this logic cannot, or at least should not, provide the basis for assessment of a CMP. Respondent does not mean to be overly critical of the inability of the OCC examiners to understand the methodology employed by the Bank. After all, everyone concedes that, due to the Bank's unique history of no loan losses prior to 1992, the methodology was of necessity unique and therefore unfamiliar to the OCC. Respondent nevertheless must state that, on this record, assessment of a CMP is both inequitable and unjustified. Otherwise, every director of every bank in the United States is subject to a civil money penalty assessment upon no more proof other than that the OCC does not understand why a bank's operations have been successful.

EXCEPTION NO. 7:

Respondent concedes that, under the conditions as described in the Recommended Decision, the decision by the Bank (and Respondent) not to demand updated financial information from certain borrowers on "precarious loans" where the Bank's primary objective was collection could be construed as "technical non-compliance with Article XIII of the Consent Order." However, Respondent does take exception with the Court's conclusion that such "technical non-compliance" forms "... [a] sufficient basis for the imposition of civil money penalties."

(ALJRD, p. 16, second full paragraph.)

Respondent also takes exception to related FOF Nos. 298-302, inclusive.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent conclusively established at trial, and the Court agreed in its Recommended Decision, that it was legally impossible for the Bank to obtain updated financial information on most borrowers, that the OCC stipulated that literal compliance with Article XIII would not be required, and that to have demanded updated financial information on certain "precarious loans", would have threatened the very collectability of those loans.

Under these circumstances, to conclude that Respondent's decision not to threaten the collectability of these "precarious loans" by demanding updated financial information to which the Bank was legally not entitled nevertheless is sufficient basis to assess a civil money penalty against Respondent is to stand the regulatory process on its head. In essence, the OCC has issued a consent order and insisted upon literal compliance with it, not withstanding the conceded fact that such literal compliance would in fact be far more damaging to the Bank than compliance.

CONCLUSION

Based on the foregoing exceptions, supporting evidence and argument, Respondent respectfully takes exception to the Court's Conclusions of Law Nos. 4-9, inclusive.

DATED: March 6, 1995 Respectfully submitted,

/s/ Michael W. McCann
CAPPELLO & McCANN
Attorneys for Respondent

DECLARATION OF MICHAEL W. McCANN

I, MICHAEL W. McCANN, declare under penalty of perjury as follows:

1. I am a partner in the law firm of CAPPELLO & McCANN, attorneys for Respondent herein. I have personal knowledge of the facts stated herein and can competently testify thereto if called upon to do so.

2. Attached hereto as Exhibit 1 are true and correct copies of page 467 (face page), page 573-578, and page 708 (Certificate of Deposition Officer) from Volume III of the deposition of John F. Henning, Jr. taken on November 16, 1994 in San Francisco Superior Court Case No. 950665.

3. I also represent Respondent William C. Sarsfield in San Francisco Court Case No. 950665.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed at Santa Barbara, California, on March 6, 1995.

/s/ Michael W. McCann

[Filed Mar. 6, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM S. SARSFIELD, Former Chairman and Current Director,
SEQUOIA NATIONAL BANK, San Francisco, California

OFFICE OF THE COMPTROLLER OF THE CURRENCY'S EXCEPTIONS TOTHE RECOMMENDED DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

OCC'S EXCEPTIONS TO THE ALJ'S RECOMMENDED DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

These exceptions are filed pursuant to the Office of the Comptroller of the Currency's ("OCC") Rules of Practice and Procedure, 12 C.F.R. § 19.39. The Recommended Decision, Findings of Fact, Conclusions of Law and Proposed Order ("Opinion") in this case were served by personal service upon the OCC on February 3, 1995. The OCC concurs with the findings of Administrative Law Judge ("ALJ") Arthur L. Shipe in the majority of his Opinion. However, the OCC respectfully excepts to certain Findings of Fact, to ALJ Shipe's failure to find noncompliance with two Articles of the

Consent Order, his characterization of certain violations as merely "technical," his finding that the Respondent exercised good faith, and to the issuance of a Proposed Order recommending a Civil Money Penalty total lower than the penalty amount assessed in the Notice of Assessment.

I. RESPONDENT MADE ONLY A SUPERFICIAL EFFORT AT COMPLIANCE

This action concerns noncompliance by Chairman of the Board William C. Sarsfield ("Respondent") with the March 1992 Consent Order ("Order") placed by the OCC upon Sequoia National Bank, San Francisco, California ("Bank"). The ALJ has found Respondent's violations of Articles VI, VII, IX, XII and XIII of the Order to not be "flagrant" or "intentional," and has found that "substantial effort was undertaken to comply with the OCC mandates." (Opinion 18). He has also found "good faith" on the part of the Respondent. (Opinion 19). The OCC respectfully excepts from the ALJ's findings that Respondent exercised good faith or made a substantial effort to comply with these Articles of the Order. As the OCC has demonstrated through testimonial and documentary evidence, Respondent's attempts to comply with the Order were merely superficial.

In his Opinion, the ALJ emphasizes the existence of a split between the two factions on the Bank's Board of Directors,[1] and accordingly has not given great weight to the testimony of former minority faction Directors Henning and Bolles. In contrast, the ALJ does credit the testimony of, and nowhere casts doubt on the credibility

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[1] Respondent was a member of the majority faction, which had the ability to outvote the minority faction. (Opinion 23).

or memory of, OCC National Bank Examiners Raymond Sander and Nicholas Ragus. Yet, in spite of this apparent respect for the testimony of Sander and Ragus, the ALJ has overlooked portions of the record containing information and statements of these examiners which tend to show that Respondent's failure to comply with the Order was egregious, and his efforts merely superficial.

A. Articles VI and VII: Liquidity and Volatile Liabilities

The OCC concurs with the ALJ's finding that Respondent violated Articles VI and VII of the Order. However, the OCC excepts to the ALJ's finding that Respondent made a "substantial effort" (Opinion 18) to comply, and exercised "good faith" in that effort. (Opinion 19). The record is clear that Respondent's efforts to comply with these Articles were merely superficial, and that his failure to take remedial action was so widespread and so dangerous to the safety and soundness of the Bank as to constitute a display of bad faith on his part.

In spite of multiple previous citations noted in the record (Opinion 24-26, 28; OCC exhibit 1, p.3; OCC exhibit 2, ppg.1-2; OCC exhibit 4, ppg. 5-6; OCC exhibit 5, ppg. 3-4; Sander TR 34), during the period of the Order Respondent failed to implement action to increase core deposits and reduce the Bank's percentage of volatile liabilities. Sequoia's percentage of volatile deposits was 72% at the December 31, 1992 examination, unchanged from the Bank's previous examination. (OCC exhibit 45, p.1; OCC exhibit 47; OCC exhibit 48; OCC exhibit 51; OCC exhibit 52; Sander TR 72-77). At the December 31, 1992 examination, Sequoia's core deposits were under 20%, while its peer group was at 80%. (Sander TR 78-79; OCC exhibit 53, p.9) .

During this entire time, Respondent's Consent Order responses failed to address the central theme of the Bank's reliance on volatile liabilities as a percentage of total deposits. (Sander TR 721; Sarsfield exhibit 5).

The Respondent has claimed that he had a plan to reduce volatile liabilities, which consisted of selling assets. (Sarsfield exhibit 37; Sarsfield TR 291-292). This simplistic approach could not properly be considered a plan at all, since it failed to take into account such basic needs as a statement of how and to whom the Bank would sell these assets. (Sarsfield exhibit 37). However, such details should have been addressed because, as of December 31, 1992, Sequoia had planned for over six months to sell home equity loans of $11 million to reduce dependence on volatile liabilities, but failed to consummate the plan because the files needed extensive work to be made saleable, and because the equity lines were earning assets. (OCC exhibit 45, p.2).

In his Opinion, the ALJ does not appear to give sufficient weight to evidence that, even if implemented, Respondent's 1992 plan would not have complied with the Order and that, in any case, Respondent made little effort to implement it. For example, Examiner Sander testified that he doubted that Respondent's 1992 plan would have met the requirements of the Order, and that Respondent made no effort to implement his plan. (Sander TR 743; OCC BR 24). In actuality, the Respondent did fail to implement even his rudimentary idea to sell assets (OCC exhibit 156, p.8), and the Bank's volatile liability percentage failed to substantially decrease by December 31, 1992. (OCC exhibit 45, p.1; OCC exhibit 47; OCC exhibit 48; OCC exhibit 51; OCC exhibit 52; Sander TR 72-77). There can be no

finding of good faith in such deficient actions and glaring omissions.

Sequoia also had a tremendous amount of interest rate risk as a result of its reliance on volatile liabilities. (Sander TR 78; OCC exhibit 53). Yet, in spite of the danger noted by Examiner Sander, the Respondent failed to take interest rate risk into account at all in his responses to the Consent Order. (Sander TR 722-723; 731). Again, it is inconceivable that Respondent could be seen as acting in good faith when a key aspect of liquidity such as interest rate risk is summarily ignored in Respondent's compliance packets.

The process of managing a bank's assets and liabilities to maximize net interest income and maintain performance, while maintaining adequate liquidity is called funds management. (Sander TR 722). To do this properly, one needs to have an Asset and Liability Management Policy. (Sander TR 82). However, as of December 31, 1992, Sequoia had no active funds management direction other than to cover running-off time deposits with new time certificates of deposit from the money desk, and to meet its cash letter. (OCC exhibit 44). The Bank's funds management policy was considered liberal, yet the Bank failed to adhere to the guidelines of even this liberal policy, (OCC exhibit 44; OCC exhibit 45; OCC exhibit 62; OCC exhibit 63, Sander TR 81-82, 89) leading Examiner Sander to conclude that Sequoia suffered from the most unsuccessful attempt at funds management that he had ever seen. (Sander TR 722-723) .

Respondent has nevertheless claimed that he proposed an asset and liability management policy to the Board, but the document that he produced as his "policy" was reviewed by Examiner Sander and found not to represent such a policy, because it lacked a liquidity standard to comply with, a level of interest rate risk that the Bank

would be willing to assume, information on how management would make liquidity decisions, information on who would do the liquidity reporting, information on balance sheet composition, and information on determining the impact of the Bank's ratio of rate sensitive assets to rate sensitive liabilities. (OCC BR 30; Sander TR 725-727; Sarsfield exhibit 39).

However, in spite of the credible testimony of Examiner Sander, the ALJ appears to have overlooked the fact that Respondent's proposed policy was grossly inadequate. Yet, the inadequacy of this policy goes right to the heart of the matter concerning Respondent's lack of a substantial effort to comply with, in this case, Articles VI and VII of the Order. A policy so replete with omissions does not represent a substantial effort to comply, and cannot and does not represent a good faith effort on Respondent's part.

Respondent even actively opposed an independent consultant who recommended an approach similar to the OCC's. (OCC exhibit 29; OCC exhibit 30). Sequoia hired consultant Jeanine Catalano of the Secura Group, to review the Bank's liquidity and volatile liability positions, and to make recommendations. (Sander TR 86-87). Catalano produced a report, first communicated to the Board in August 1992 (Sander TR 87; OCC exhibit 21) and confirming many of the OCC's findings, which concluded that the Bank's liquidity position was of serious concern, with a particular problem centering on out-of-area deposits. (OCC exhibit 23; OCC exhibit 62). Catalano concluded that the Bank's poor liquidity position exposed it to the risk of being unable to meet unanticipated cash flow needs, and recommended that the Bank update its funds management policy. (OCC exhibit 62). However, the Bank subsequently failed to update that policy. (Sander

TR 87-88). Catalano also recommended that the Bank develop a contingency plan for liquidity, in light of the ease with which its brokered and out-of-area deposits could be pulled from the Bank. (OCC exhibit 28). The Bank failed to develop this plan as well. (Sander TR 89; 741-742). Catalano also noted that she expected Sequoia to sell and or collect a package of loans and use the proceeds to reduce volatile liabilities. (OCC exhibit 62). The Bank also failed to do this. (Sander TR 88).

In the opinion of both the OCC and independent consultant Catalano, Respondent's "efforts" to comply with the Order were superficial and inadequate, omitting entire necessary areas of analysis, such as interest rate risk and a liquidity contingency plan. This shows the utter lack of good faith on the Respondent's part, a lack of good faith which is compounded when one also considers that the Bank had been cited for its liquidity failings at many previous examinations as well.

B. Article IX: Loan Policy

Although the OCC concurs with the ALJ's finding that Respondent violated Article IX of the Order, the OCC excepts to the ALJ's finding that Respondent made a "substantial effort" (Opinion 18) to comply, and exercised "good faith" in that effort. (Opinion 19) .

The OCC concurs with the ALJ's finding that Respondent's loan policy violated Article IX because it was not approved by the Board of Directors, had no requirement for updated financial information for problem loans, or for equity line annual reviews, had no loan-to-value guidelines for commercial loans, land loans or standby letters of credit, had no linking of maturities with repayment source, had inadequate guidelines for loan distribution, had

unreasonable maximum limits for loan types, had no limit for land loans and no concentration limits for land loans, had no requirements for documentation of the specific purpose of loans, and no statement of who is responsible for compliance with the policy, called for annual instead of quarterly loan reviews, did not have the new BB 91-19 definition of "in process of collection," had a charge-off guideline of "principal and interest past due six months" instead of "principal and/or interest past due six months," had no loan administration program to correct identified weakness, and had no insider loan limit specifics. (Opinion 59-61; OCC exhibit 153; OCC exhibit 64; OCC exhibit 12).

In defense to these facts, Respondent has made an unsupported argument that the reason why the Bank's loan policy was not adequately revised as of December 31, 1992, was because the OCC had accepted an early draft as sufficient. Respondent's explanation is completely without support in the record, and serves to demonstrate the utter lack of good faith on his part.

It is clearly important for any bank to have an adequate loan policy, to guide it in its determinations of how to allocate its resources. It is especially important for a problem bank such as Sequoia to have a policy to guide it in these decisions. A problem bank, by its very nature has to exercise care to make sound loan decisions, so as to not put its unusually limited resources to unnecessary risk. Despite Sequoia's status as a bank in imminent danger of failure (Opinion 34; OCC exhibit 12, p.2), and despite the many deficiencies noted in the Bank's loan policy, Respondent failed to adequately revise that policy. The ALJ concluded that the OCC made very clear that it reserved the right to comment on Respondent's initial draft, and that the June 30,

1992 examination set out in detail the OCC's concerns. (Opinion 10). Respondent's failure to make the wholesale changes required in the policy by December 31, 1992 demonstrates his lack of good faith, and cannot be seen to represent a substantial effort.

C. Article XII: Allowance for Loan and Lease Losses

Additionally, despite finding that the Respondent failed to comply with Article XII of the Order, which concerns the Bank's Allowance for Loan and Lease Losses ("ALLL") methodology, and despite finding no reason to doubt the reasonableness or credibility of Examiner Nicholas Ragus, the ALJ appears to give little weight to Mr. Ragus' observations that in a well-run bank, the bank is supposed to identify loan losses before the regulators do (OCC BR 54; Ragus TR 765), and that if a bank is continually directed by the OCC to take loan charge-offs, even if they're cooperative in doing so, that bank does not have an adequate ALLL function because its loan grading is deficient. (OCC BR 54; Ragus TR 765). Despite being cited for a faulty ALLL methodology in five Reports of Examination, the Bank still failed to satisfactorily explain its ALLL methodology. (Opinion 13). This further demonstrates the egregious nature of Respondent's violation of Article XII.

Although some of the requirements of the Order may seem technical from the perspective of a sound bank, it is important to remember that Sequoia was not a sound bank. The Order was designed to bring the Bank back to a safe and sound condition, if its provisions were observed. The Respondent failed to comply with those provisions, which allowed a Bank in poor condition to remain in poor condition, literally on the brink of failure. (Opinion 34; OCC exhibit 12, p.2). Clearly, the violation of Article XII was substantial,

not merely technical, in that the Bank's lack of a proper ALLL methodology continued for years despite OCC citations, and ultimately led in 1992 to ALLL shortfalls corrected only by the OCC at examinations. (Opinion 79; Ragus TR 756-757).

D. Article XIII: Credit and Collateral Exceptions

Although he found that Respondent violated Article XIII of the Order, the ALJ erred in his characterization of Respondent's failure to comply with Article XIII of the Order as "technical." (Opinion 16). The ALJ overlooked a great deal of uncontroverted evidence in the record, showing that the noncompliance with Article XIII was not merely technical.

Approximately 75% of the loans reviewed during the December 31, 1992 examination had exceptions. (Opinion 80; Ragus TR 211; OCC exhibit 43, p.16; OCC exhibit 139). It is important in any bank to have complete loan files, so that a proper analysis may be made of expected repayment sources, and to monitor the credit after funds are extended. (Opinion 82; Ragus TR 215). It is particularly important to have complete loan files in a problem bank such as Sequoia, where the Bank's condition was so precarious that the default of a few large credits could have crippled the Bank or rendered it insolvent.

There are many specific examples of inadequate files at the Bank. For example, the loan report for the California Properties loan, which was eventually charged off as a $282,000 loss, had a financial analysis exception and an inadequate repayment source analysis. (OCC BR 55; Ragus TR 211; OCC exhibit 139). Similarly, the loan report for the loan to Borrower M did not note the repayment source, the financial statement analysis did not balance to the borrower's financial statement,

the borrower's financial statement did not list all debt, and the loan summary did not contain an adequate cash flow analysis. (OCC BR 55; Ragus TR 211; OCC exhibit 139). The loan report for the $375,000 loan to Borrower L had a stale financial statement (OCC BR 55; Ragus TR 212; OCC exhibit 139), and the loan report for the $302,000 loan to Director Krug had no cash flow analysis, and no financial statement for the borrower's son-in-law, even though he was the expected repayment source. (OCC BR 56; Ragus TR 212; OCC exhibit 139). The loan extension report for the $545,000 loan to Borrower DR also did not contain an adequate cash flow analysis. (OCC BR 56; Ragus TR 213; OCC exhibit 139) .

Director Henning has testified that he considered Sequoia's loan files to be a "disgrace," with missing documentation and no set procedure, and with no real attempt to clean the files or get all of the documentation until late December 1992. By the end of the year, however, this had not been accomplished. (Henning TR 777) .

Not only did Respondent fail to maintain updated files on old loans, but he also failed to obtain information on new loans at the time they were made, even after he consented to issuance of the Order. As the ALJ has noted in his Findings of Fact, four new loans with inadequate cash flow analysis were made after the Order was signed. (Opinion 81; Ragus TR 214-215; OCC exhibit 139). Files with an inadequate cash flow analysis or files with inadequate repayment source analysis are fundamentally incomplete at the outset, and can easily lead to a situation where a bank lends substantial amounts to borrowers unable to make payments. This violation is substantial, not merely technical, as no reasonable explanation is given in the record to justify the Bank's documentation failures on an ongoing basis.

II. RESPONDENT FAILED TO COMPLY WITH ARTICLE X OF THE ORDER

The OCC respectfully excepts from the ALJ's finding that Respondent complied with Article X of the Order. Specifically, the ALJ erred by giving substantial weight to Respondent's evidence of subsequent repayment of certain loans downgraded by the OCC's examiners, using this as a basis to find that the Bank's loan review program was not so inadequate as to warrant a citation for noncompliance with the Order.[2] (Opinion 12, 70).

The ALJ correctly recognizes the deference afforded National Bank Examiners in the area of loan classification.[3] (Opinion 70).

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[2] Throughout the hearing, Respondent's counsel introduced evidence, over the OCC's objection, of the disposition of several of the loans criticized by the OCC. Such testimony is irrelevant to the examiners' loan classification since the testimony involves events subsequent to the examiners' determination of risk.

[3] Courts have traditionally accorded great deference to the findings and conclusions of Federal bank examiners, given their expertise and the highly technical nature of the subject matter involved. "Unless shown to be arbitrary or capricious, or outside a zone of reasonableness, the ALJ, the [Federal banking agency adjudicatory decision-maker], and the courts must give significant deference to these experts." Sunshine State Bank v. Federal Deposit Insurance Corporation, 783 F.2d 1580, 1584 (11th Cir.

However, the ALJ failed to credit the proposition that the deference afforded examiners' judgments on the risks inherent in a bank's assets and liabilities is not diminished by events which occur subsequent to that determination. The Comptroller has specifically ruled that:

> [f]acts occurring after the classification of a loan have no bearing on the deference accorded the examiner in making the original classification. The examiner's classification and other similar risk assessments involving the exercise of predictive judgment cannot by their nature be measured by subsequent events. The examiner can only determine, based on his experience and training, that a loan does not satisfy accepted standards of prudent banking operations. The fact that, for example, a loan is ultimately paid off does not affect the validity of the examiner's determination which provides the basis for subsequent actions by the OCC and the bank.

In the Matter of Lakeside National Bank of Lake Charles, Lake Charles, Louisiana, No. AA-SW-90-165, 11-12, (May 8, 1992).[4] Under the rule

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1986)

[4] See also, Bank of Dixie v. Federal Deposit Insurance Corporation, 766 F.2d 175, 178 (5th Cir. 1985), for the proposition that evidence of corrective measures taken after the issuance of an order constitutes no defense to the issuance of that

of this precedential decision, subsequent repayment is irrelevant, and the ALJ should not have taken into account, over the OCC's objections, the ultimate disposition of the loans in question.

The ALJ has also erred in finding that Respondent made a good faith effort at proper loan review, an error which becomes apparent when one reviews the entire record. Regardless of the weight given to the evidence of subsequent loan repayment, it is clear that

Respondent failed to implement an adequate loan review as required by the Order.

At the hearing, Examiner Ragus testified that the main element of an effective loan review program is that it accurately grades the loans in the bank's portfolio in order to identify problem loans and to determine the amount of credit risk and loss potential in the portfolio. (Ragus TR 177). The record demonstrates that the Bank had failed to perform this function for years prior to the issuance of the Order. The Bank had first been cited at February 28, 1989 examination for needing improvement in its loan portfolio supervision. (OCC exhibit 1, ppg.1-2) . These concerns were not addressed at that time, because the Bank was again cited at its March 31, 1990 examination, for an upward trend in problem loans. (Sander TR 35; OCC exhibit 2, ppg.1 and 3; OCC exhibit 2, p.2 of June 12, 1990 letter to Board). Still, no improvement occurred, because the July 31, 1991 examination of Sequoia noted that the Bank still had ineffective loan portfolio supervision, including liberal underwriting, an inability to detect problem loans, and a failure

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order.

to ensure insider legal compliance. (OCC exhibit 4, p.9) .

As evidenced by the findings at the December 31, 1992 examination, and in keeping with this historical pattern, the Bank's loan review program still completely failed to properly grade and identify problem loans at that time. At the December 31, 1992 examination, the OCC's examiners downgraded 10 of the 41 loans that were reviewed, 21% of the entire loan sample, totaling $2,565,000. (Ragus TR 179; OCC exhibit 127) .

The Respondent has repeatedly noted that many of the OCC's downgraded loans eventually paid off. However, it is instructive that the two loans examined in 1992 that became eventual losses were so huge, totalling over $700,000, that they completely wiped out the Bank's ALLL. (Ragus TR 756) .

In addition, these loans had such glaring weaknesses that it is hard to imagine how they could have been graded anything other than loss. For example, at the time of the December 31, 1992 examination, the Bank had internally classified the $282,000 loan to California Properties as doubtful. (OCC exhibit 128). However, the California Properties loan had such severe weaknesses that it could not be considered a bankable asset. (Ragus TR 182). The loan was an insider-related credit whose source of repayment was cash flow from the Hotel Californian. (Ragus TR 180; OCC exhibit 82). Not only was the cash flow from the hotel considered insufficient to service the debt, but the borrower was severely delinquent on the first deed of trust and real estate taxes, city taxes, payroll taxes, and the ground lease. (Ragus TR 181; OCC exhibit 43, ppg.25-26; OCC exhibit 82). At the time of the December 31, 1992 examination, the loan was on nonaccrual and the Bank's only security was in the hotel's furniture, fixtures and equipment.

(Ragus TR 180-181; OCC exhibit 43, ppg.25-26; OCC exhibit 82). The guarantor, Bank Director Norman Krug, provided no financial support for the credit. (Ragus TR 184; OCC exhibit 43, ppg.25-26; OCC exhibit 82).

The OCC's examiners properly classified the California Properties loan as a loss. (Ragus TR 182; OCC exhibit 43, p.23; OCC exhibit 129). The Bank did not disagree with the OCC's classification and charged off the credit in its entirety. (Ragus TR 184-185; OCC exhibit 152).

Another example of the Bank's failure to achieve adequate classification is the $86,500 loan to Borrower M. At the time of the December 31, 19[illegible] examination, the Bank did not internally classify the Borrower M loan, rating it as "pass." (Ragus TR 187; OCC exhibit 128). The source of repayment for this loan was supposed to be construction financing to be obtained from another institution. (Ragus TR 186; OCC exhibit 108). However, the loan file contained no analysis of the borrower's ability to obtain a construction loan and the borrower provided no other support for the credit. (Ragus TR 187; OCC exhibit 108). The OCC's examiners properly downgraded this loan to substandard. (Ragus TR 187; OCC exhibit 43, p.24; OCC exhibit 129).

A third example is the $376,000 loan to Borrower L. At the time of the December 31, 1992 examination, the Bank internally classified the Borrower L loan as OAEM. (Ragus TR 192; OCC exhibit 128). However, this loan also had weaknesses that warranted a more severe classification. The Borrower L loan was delinquent and on nonaccrual, and the Bank was forced to file a notice of default in order to effect payment. (Ragus TR 192; OCC exhibit 101). For these reasons, both the OCC's examiners and the Bank's own consultant

downgraded the loan to substandard. (Ragus TR 192-193; OCC exhibit 43, p.23; OCC exhibit 120; OCC exhibit 129).

In addition to these credits, the OCC's examiners also properly downgraded the following loans:

Borrower	Loan Amount	Bank Rating	OCC
Borrower F/ Borrower O	$194,000/ $164,000	OAEM	Substandard
Borrower E	$263,000	Pass	Substandard
Borrower B	$150,000	Pass	Substandard
Borrower PL	$100,000	Pass	OAEM
Borrower P	$450,000	OAEM	Substandard
Borrower G	$400,000	Pass	OAEM
Borrower K Trust	$100,000	Pass	OAEM

(OCC exhibit 43, ppg.23-24; OCC exhibit 128; OCC exhibit 129).

In sum, the Bank's loan review program failed to do the one thing that it was supposed to do: it did not accurately grade the Bank's loans. (Ragus TR 188; OCC exhibit 43, p.16; OCC exhibit 74). Therefore, it was not an effective program and it failed to comply with Article X of the Consent Order[5]. (Ragus TR 197; OCC exhibit 43, p.16;

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[5] Additionally, the ALJ has noted that the Bank hired an outside consultant, Roger Cabell of JRC Associates, to examine

OCC exhibit 74) .

It should also be noted that the ALJ found that many of the Bank's problem loan reports, including the California Properties loan, lacked purpose and repayment source information, proper cash flow analysis, adequate action plans, and timeframes[6]. (Opinion 68; Ragus

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loan portfolio procedures, and has found that Cabell noted that the Bank's loan expectations and ratio of classified assets was twice as much as the Bank's peer group. (Opinion 67). Cabell reviewed 38 loans in his December 1992 review, including 15 that were previously reviewed. (Opinion 67).

[6] Article X of the Order required that problem loan reports be filed with the Board on a quarterly basis, with monthly updates. (Ragus TR 176-177; OCC exhibit 8, ppg. 15-16). However, the Bank failed to comply with this requirement as well. Many of the reports that were filed lacked purpose and repayment source information, proper cash flow analysis, adequate action plans, and timeframes. (Ragus TR 194; OCC exhibit 121). They lacked events that would trigger an upgrade or a downgrade in the credit and sufficient support for the allowance for the loan and lease loss ("ALLL") allocations for the problem loans. (Ragus TR 194; OCC exhibit 121). And some of the reports contained stale financial information and inadequate analysis of financial information. (Ragus TR 194; OCC exhibit 121). For example, the report for the Borrower L loan lacked an adequate cash flow

TR 195; OCC exhibit 121). Many such reports also lacked events that would trigger an upgrade or a downgrade in the credit and sufficient support for the ALLL allocations for the problem loans. (Opinion 68; Ragus TR 194; OCC exhibit 121).

Between the faulty grading of its problem loans, two of which ended up wiping out the Bank's entire ALLL, and the Respondent's failure to prepare adequate problem loan reports, it is clear that the Bank's entire system for monitoring its loan portfolio was inadequate and flawed. There was far more wrong with the Bank in this area than mere subjective grades of classified loans, and the problems in this area had persisted for years. When one examines the entire record of Respondent's failures in the area of loan portfolio review, it is readily apparent that the ALJ has erred in characterizing this as mere subjective differences between the OCC and Bank on a few loan classifications.

III. RESPONDENT FAILED TO COMPLY WITH ARTICLE XV OF THE ORDER

In determining compliance with Article XV of the Consent Order, the ALJ erred in failing to take into account the several prior warnings, including the warning at the June 30, 1992 examination, that the OCC had provided to the Respondent on the issue of the

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analysis, failed to explain or support the ALLL allocation and contained stale financial information. (Ragus TR 194; OCC exhibit 121). And, a problem loan report for the Borrower M loan was never submitted because the Bank rated it a pass. (Ragus TR 195; OCC exhibit 121).

valuation of one component of the Bank's capital account, its Excess Servicing Fee Receivables ("ESFRs") . (OCC exhibit 12; Sander TR 731-732; Henning TR 782-984) . In the absence of a proper valuation for the ESFRs, the Respondent was on notice that the OCC might require the Bank to charge off their booked value. Consequently, the OCC's direction to charge off these assets after the December 31, 1992 examination was not a surprise to the Bank or the Respondent.

The ALJ has, in his decision, accepted the proposition that Respondent was on notice (Opinion 38-39), but inconsistently and erroneously omits this from his analysis and determination of whether or not there was compliance with the Order. (Opinion 16-17). Consequently, when they are included in the analysis, the prior warnings about the threat to the Bank's capital demonstrate that Respondent may, and should, be held responsible for the Bank's inadequate capitalization as of December 31, 1992. In fact, it is likely that the Bank was inadequately capitalized for purposes of the Order for a long period of time prior to December 31, 1992. There is no way of knowing if it was or was not, specifically because Respondent failed to secure justification for the valuation of the ESFRs.

The ALJ also finds, on page 83 of the Opinion, that the Bank cured its tier-one capital shortfall in May 1993. The OCC respectfully excepts to this Finding of Fact on the grounds that subsequent remedial actions are not relevant to the issue of compliance with the Order as of December 31, 1992. The OCC made a timely objection to such evidence on the record, and was overruled by the ALJ. Just as subsequent disposition of an asset should not affect the classification of that asset at a point in time, subsequent increases in the capital account should not affect the validity of a

finding that the Bank's tier-one capital was less than 8% as of December 31, 1992. See Lakeside, 11-12.

IV. RESPONDENT SHOULD BE ORDERED TO PAY A CIVIL MONEY PENALTY OF $15,000

The ALJ has accepted the OCC's evidence concerning the long evidence of problems at the Bank with regard to liquidity, volatile liabilities, problem loans and ALLL methodology. (Opinion 23-30). It is clear from the record that several years of OCC criticism elapsed before the Order came into being. The problems underlying the Order were not new ones for the Bank or the Respondent, yet by December 31, 1992, the Bank and the Respondent had still failed to comply with the Order. The significance of this failure to comply was magnified by the Bank's exceedingly poor condition, on the brink of failure with a CAMEL rating of "5." (Opinion 34; OCC exhibit 12, p. 2).

The Respondent was a member of the majority faction on the Board, with the ability to outvote the minority faction. Despite his claim that noncompliance with the Order was the result of an effort by a minority group of directors (Sarsfield BR 3), Respondent has offered no evidence to show how, if at all, the minority succeeded in thwarting the will of the majority. Yet, when December 31, 1992 came, Respondent's majority had still not effected compliance with the Order.

The areas of noncompliance are not mere technical requirements that the OCC arbitrarily imposed on the Bank. Rather, they went to the heart of the Bank's safety and soundness, and were only imposed with the consent of the Bank's board of directors, including Respondent. Reducing volatile liability dependence,

maintaining adequate liquidity, developing a satisfactory loan policy, establishing an adequate ALLL methodology, obtaining complete financial information on borrowers, and maintaining sufficient capital levels are bedrock principles of safety and soundness. Viewed in this light, the OCC did not ask Sequoia to do anything that a well-run bank should not already have been doing. But, Sequoia was not a well-run bank. At the time of the December 31, 1992 examination, it was a 5-rated institution beset by severe liquidity and asset quality problems, whose very survival was hanging in the balance. Despite the Bank's perilous condition, and his pledge to comply with the requirements of the Order, Respondent treated compliance with the document as nothing more than a paper-shuffling exercise.

The size of Respondent's financial resources are not at issue in this action, since Respondent has stipulated to his ability to pay the entire assessment at one time. (Joint exhibit 1). And, for violation of even one Article of a Consent Order for an eight month (240 day) period, the OCC has the authority to assess a first tier civil money penalty of $1,200,000. In finding in favor of the Respondent on two of the seven Articles of the Order, which for the reasons stated above the OCC respectfully excepts to, the ALJ has reduced the Recommended penalty to $10,000. The OCC chose to assess Respondent a penalty in the amount of $15,000, because it was believed after careful weighing of the issues involved, that this would be an appropriate amount to effectuate supervisory policy. In light of the agency's considerable penalty authority, and in light of the continuing nature of the Bank's problems for years leading up to the assessment, the OCC continues to believe that $15,000 is both fair and justified.

V. Conclusion

The Comptroller should order Respondent to pay a civil money penalty in the amount of $15,000.

Date: March 6, 1995

Respectfully submitted,

/s/ Michael Bloise
Enforcement & Compliance
Division
Office of the Comptroller
of the Currency
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APPENDICES VOLUME II OF III

(106a-242a)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

WILLIAM C. SARSFIELD

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

No. AA-EC-93-144

WILLIAM C. SARSFIELD

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

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137 pp

[Filed Feb. 3, 1995]

UNITED STATES OF AMERICA

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC-AA-EC-93-144

In the Matter Of: William C. Sarsfield, Former Chairman of the Board and Current Director; Kent D. Glover, Former President and Current Director; Charles Puccinelli, Peter P. Bolles, Thomas J. Niedermeyer, Sr., and Richard C. Van Valer, Former Directors; John F. Henning, Jr., and Norman I. Krug, Current Directors, Sequoia National Bank, San Francisco, California

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Recommended Decision

Appearances:

For the Office of the Comptroller of the Currency

Mr. Michael G. Bloise, Esq.

Mr. Daniel P. Stipano, Esq.

For Respondent William C. Sarsfield

Mr. Michael W. McCann, Esq.

ARTHUR L. SHIPE, Administrative Law Judge

I. SUMMARY

This proceeding arises from a Notice of Assessment of Civil Money Penalties issued by the Office of the Comptroller of the Currency on November 20, 1993. The Notice assessed penalties against each member of the Sequoia National Bank Board of Directors, in the amount of $15,000 against Respondents Sarsfield and Glover, and $5,000 against Respondents Puccinelli, Bolles, Neidermeyer, Van Valer, Henning, and Krug. Jurisdiction of the proceeding has not been contested.

During pre-hearing negotiations, all respondents settled their respective assessments with the exception of Respondent Sarsfield, whose matter was heard in San Francisco, California, during the period June 7 - 10, 1994. The parties appearing at hearing were represented by the above counsel.

After careful consideration of the entire administrative hearing in this proceeding[1], to include my observation of the evidence, the arguments, and witnesses presented, I recommend that Respondent Sarsfield be assessed civil money penalties in the amount of $10,000 for the violations and reasons set forth in more detail below.

II. DISCUSSION OF FACT

Respondent Sarsfield is a current director and former board chairman of the Sequoia National Bank ("Sequoia National"), San

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[1] The Respondent's Post-Hearing Motion to Strike Section II of the OCC's Reply Brief is hereby DENIED, and the entire brief is received.

Francisco, California. His long career in the banking industry includes several executive positions with respected financial institutions; experience as an Assistant national Bank Examiner with the Office of the Comptroller of the Currency; the position of adjunct professor of banking at Golden Gate University; and recognition for many years as a consultant and expert on the subjects of banking and venture capital.

In the year 1984 Respondent joined together several investors for the purpose of establishing in the bay area a savings and loan institution to finance certain real estate transactions. The institution first opened in the year 1986, and the following year, 1987, converted its charter to that of a national banking association, under which it has operated ever since.

From the very beginning, Respondent Sarsfield always played a key role in the direction of Sequoia National. He initially began his service as chairman of the institution's holding company, eventually became a senior executive officer, and finally Chairman of the bank's board of directors.

Sequoia National first drew regulatory concern in the year 1988, when an OCC examination conducted as of February 29, 1988, cited several unacceptable practices, including unreasonable reliance and dependence on volatile funds, unacceptable reserve allocations for problem loans and lease losses, and inadequate supervision over the loan portfolio. Overall the bank was in satisfactory condition, and was assigned a CAMEL rating of 2, reflecting a fundamentally sound institution, with modest weaknesses correctable in the normal course

of business.

The next OCC examination was conducted as of March 31, 1990. The results of this examination concluded that the Sequoia board of directors had not implemented the recommendations made in the previous examination, and that many of the same problems persisted. Though the overall condition of the bank remained satisfactory, the institution was again assigned a CAMEL rating of 2.

The next examination was conducted as of July 31, 1991. The results of this examination disclosed significant deterioration in the institution's overall operating condition, and resulted in the assessment of a CAMEL composite rating of 4. This rating obviously indicates an immoderate volume of serious financial weaknesses or combination of other conditions, which were cite by the examiners as unsatisfactory. Much, if not all of the deterioration, was attributed to the same weaknesses that had been discussed in the previous examinations.

The OCC examiners specifically expressed concern about a number of factors, including the bank's inadequate cash flow analysis, problem loan identification, supervision and administration of the loan portfolio, methodology behind the institutions ALLL, liquidity, over-reliance on volatile liabilities, and other problems. As a result of these findings and conclusions, the Board of Directors of the Sequoia National Bank, and representatives of the OCC, entered into a consent Cease and Desist Order effective March 4, 1992. This Order, which was reviewed in detail by the bank's board before its acceptance, contained comprehensive provisions designed to restore

operations of the bank to safe and sound standards.

The board began submitting various proposals and reports to the OCC, in the attempt to comply with the requirements of the outstanding Order. Officials of the OCC began reviewing and responding to the bank's submissions, expressing from the outset concern and criticism over some of the board's various responses.

The institution underwent its next examination as of June 30, 1992. OCC examiners carefully reviewed the articles of the consent order, and concluded that the Bank was not in compliance with the order as a whole, and specifically found noncompliance with Articles VI, VII, X, XII, XIII and XV, and partial compliance with Article IX.

As a result of these findings, the institution was assigned a composite CAMEL rating of 5, indicative of an extremely high immediate or near term probability of failure. The instant civil money penalty assessments were made as a result of these findings.

Respondent Sarsfield has steadfastly insisted throughout this proceeding that the OCC has failed to demonstrate material noncompliance with any of the disputed articles of the Consent Order. He argues that the only evidence offered in support of these allegations is the subjective opinions of bank examiners, which he characterizes as "semantic criticisms" of the monthly reports prepared and submitted by the board.

As a general matter, I find that the Sequoia board of directors, and more specifically Respondent Sarsfield himself, made some attempt to comply with the OCC requirements. Lengthy and voluminous reports were indeed prepared and submitted in response to the consent order, in an attempt to correct and remedy the problems faced by the bank.

The simple fact of the matter, however, is that the various directors of this institution were bitterly divided in personal dispute. The animosity between the members ran so deeply, that it appears, in my opinion, the board was distracted by these various personal problems, and could not provide the detailed focus required of the problems at hand.

While these personal differences cannot be said to relieve the board members of their fiduciary obligation to properly direct the affairs of the bank, they do illustrate the atmosphere in which Respondent Sarsfield, and the other members, dealt with the Consent order, and the problems presented to the board as a result thereof.

I am convinced that both the majority and the minority faction of the board genuinely wanted to achieve compliance with the consent order, and sincerely wanted to do that which was in the best interest of the bank. Their fierce disagreement, however, which actually deteriorated to a level of personal hatred between some, unfortunately precluded the effective accomplishment of either objective.

Specifically the OCC has alleged that the board of directors, and Respondent Sarsfield as the former Chairman of that board, failed

to comply with Articles VI and VII of the Consent Order. Article VI required the bank to maintain adequate levels of liquidity, and to develop and implement liquidity plans that would ensure sufficient liquid assets to sustain the bank's future operations. Article VII required that the bank implement a plan to reduce reliance on volatile liabilities.

On the issue of liquidity the board agreed to retain an outside consultant. This consultant, after considerable time and effort, made several recommendations for improvement of the institution's liquidity position, and compliance with the outstanding order.

The various board members, however, could not agree on the implementation of these recommendations. After considerable debate, the majority faction of the board (to which Respondent Sarsfield belonged) rejected the consultant's recommendations (advocated by the minority faction, and implemented the institution's own liquidity plan.

While the plan ultimately implemented by the board may have had the effect of increasing liquidity levels, it clearly did not set forth a sufficient contingency plan which was expressly required by the Consent Order.

Respondent Sarsfield argued that no such plan was needed, as no contingency or "crisis" existed which would require or justify such planning. In my opinion, however, that is not the issue. Rather, the issue is whether the board implemented a satisfactory contingency plan as required by the OCC Order, and it is my conclusion, after a thorough review of the evidence, that the board did not, thereby

failing to comply with Article VI of the outstanding Order.

Article VII required the implementation of a specific plan for the reduction of the bank's reliance on volatile liabilities. The bank did submit voluminous monthly reports on this subject during the period April through July 1992.

The OCC does not allege, therefore, that the board "did nothing" in response to this Article. Rather, the OCC charges that those actions taken by the board were not sufficient enough to alleviate bank's volatile structure, and hence, the Board should be held accountable for this noncompliance.

After considering the evidence of record, I must concur with the OCC on this issue. The information submitted pursuant to Article VII does not, in my opinion, sufficiently specify the board's intended plan, nor does it contain adequate discussion of the alternate means by which the board intends to remedy the cited concern. Accordingly, I conclude that the board's actions did not sufficiently comply with the requirements of this article.

The next issue concerns Article IX of the Consent Order, which required the Board to revise the institution's written loan policy within 60 days. The OCC examiners concluded that while management did in fact revise the policy[2], the Board of Directors had not approved or adopted this revision, nor did the revision contain certain provisions which the OCC deemed material. Based upon

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[2] The loan policy revision actually began before the execution and effective date of the Consent Order.

these findings, the examiners ultimately concluded that the institution only partially complied with the provisions of Article IX.

Obviously the question of compliance with this one particular provision, as with others discussed herein, is one of degree. It seems that most of the OCC criticism with respect to this violation focuses on the adequacy of the new policy, and not so much on its procedural irregularity.

Respondent Sarsfield argues -- and I agree -- that substantial effort went into this revision. He further argues that OCC examiners had acknowledged the sufficiency of this particular effort, such that the Board of Directors thought no further action was required on this matter.

The record reflects, however, that OCC officials made very clear the fact that they reserved right to review and comment on these new revisions. The Examination of June 30, 1992, furthermore sets forth the examiners conclusions with respect to these matters, and shows in detail the concerns maintained by the OCC.

In my opinion, the OCC's concerns are justified on this issue. While I recognize that the Board began revision of the policy almost immediately, I must conclude that further concerted effort was required on numerous provisions, and the proposal set forth by the Board did not sufficiently comply with the requirement of the outstanding Order.

The next issue involves the alleged violation of Article X of the Order, which required the Bank to implement an effective loan review program within 60 days. To assist with compliance of this

provision, the bank again retained the services of an outside consultant, who analyzed the bank's loan review policy, and made several recommendations.

The principal criticism with the bank's action in this regard is the OCC contention that several loans examined at the December 31, 1992 examination were downgraded, to classifications lower than those assigned by the bank through its own review. This resulted in the OCC contention that the loan review policy of the bank was inadequate, as it did not recognize the "proper" classifications for these various assets.

Respondent Sarsfield correctly notes, however, that virtually all of the loans classified or downgraded by the examiners paid in full, and that the institution's record of loan losses was relatively insignificant, when compared with other institutions. While I realize that the subsequent repayment of a loan does not necessarily mean its previous classification was in error, I am somewhat troubled by the OCC's blanket assertion that this board failed to adequately perform the important function of loan review.

In my opinion, this case rather poignantly demonstrates the subjectivity inherent within the practice of classifying loans. Two separate review of the same loan may result in different determinations about its status, which appears to be the case in this matter.

The question here is not whether the classifications assigned by the examiners were right or wrong, for I have no quarrel with -- and the bank in many cases accepted -- those conclusions ultimately

reached by the OCC. The question is whether the bank's loan review policy was so inadequate as to warrant a citation for noncompliance with Article X of the Order, and I cannot agree that it was.

The evidence in this case demonstrates that the bank monitored its loan portfolio, that it assigned classifications to those loans which it identified as troubled, that the OCC examiners disagreed with several of the levels of classifications assigned by the bank and downgraded those assessments, and that virtually all the loans downgraded by the examiners were repaid in full, including several which were downgraded to "loss".

On this record I cannot conclude that the loan review program maintained by the bank was so inadequate as to support the imposition of civil money penalties against this Respondent.

The next issue involves the OCC contention that the Board failed to establish an adequate program for the maintenance of an Allowance for Loan and Lease Losses, as required by Article XII of the Order. Again, as with other alleged violations, the basis of this charge is not that the bank failed to maintain an allowance for such losses, but rather, that the methodology behind the bank's allowance was unsatisfactory.

Respondent Sarsfield offered into evidence the many monthly reports that were filed with the OCC on this issue. Each of these reports demonstrates the allowance established by the bank, but none of them clearly explains the methodology employed in arriving at these various standards.

This issue was repeatedly cited in no fewer than five of the bank's examination reports, yet for reasons that are not completely clear, the board did not set forth, in my opinion, a satisfactory explanation for the amount of allowance allocated for the various assets within the portfolio.

Respondent Sarsfield argues that because of the unique loan losses incurred by the bank, a more complex methodology was employed to analyze and allocate the reserve for prospective losses.

If this were the case, I should think that a detailed description of this methodology would be in order. I cannot, however, conclude that such description was ever provided, nor can I conclude that the board sufficiently complied with Article XII of the consent order for this very reason.

Article XIII alleges that the bank did not obtain current and satisfactory credit information on certain existing loans, nor did it ensure that proper collateral documentation was secured and maintained on existing secured credits.

The record reflects that multiple loans reviewed subsequent to the entry of the Consent Order did not contain updated financial information, some 20 percent of the loans did not contain adequate appraisals, and several newly-extended loans did not contain adequate cash flow analysis to support their approval.

Respondent Sarsfield does not dispute the collateral exceptions or the exceptions involving inadequate cash flow analysis. In response to the allegations concerning the financial information, He argues that the bank lacked any legal means by which to require

updated financial information for those equity lines with current payments. This legal impossibility was communicated to officials of the OCC, who apparently acknowledged this problem, indicating that reasonable efforts to obtain the information would suffice.

Respondent Sarsfield testified that bank officials sent letters to various borrowers, requesting the updated financial statements. On certain "problem loans," however, the Respondent specifically instructed the officers not to send such letters, as he was "taking on the responsibility of trying to collect the loans." (Tr. at 462 L. 21)

With several of these problem loans the Respondent indicated that he"did not care what [the] financial condition looked like" but rather, simply "wanted that loan paid." (Tr. at 466 L. 20).

While I can certainly understand the Respondent's concerns with respect to these borrowers, and the difficulty experienced by the bank in collecting these credits, I do not think that Respondent Sarsfield can choose to disregard the requirement that he take reasonable efforts to obtain updated financial information on these particular customers.

Granted, the borrowers may not be obligated to produce this information under state law. This possibility the OCC specifically recognized.

Nothing, however, precludes the bank from taking reasonable efforts to procure this information, and in this particular case, Respondent Sarsfield admits he chose not to. His reasons for having chosen this course of action may have some validity, in that he did not want to offend the borrowers, or threaten the collection of these

precarious loans.

The consequence of this action, however, is technical noncompliance with the Consent Order, which I conclude forms a sufficient basis for the imposition of civil money penalties.

The final allegation in these proceedings involves the charge that the board failed to comply with Article XV of the Consent Order, which required the bank to maintain Tier 1 capital in the amount of 8 percent, and to develop and submit to the OCC a three year capital program detailing the specific plans and projections of current and future capital needs.

The evidence in this regard demonstrates that the bank maintained capital in excess of the 8 percent minimum, and employed conscientious efforts to insure the continued capitalization of the institution.

In February of 1993, OCC examiners directed certain accounting adjustments to the Freddie Mac/Fannie Mae servicing contracts maintained by the bank, and these adjustments, which were retroactively applied to December of 1992, caused the institution's Tier 1 Capital to drop to a level slightly below the 8 percent minimum. Within three months Sequoia sold certain assets, and restored the capital account to a level exceeding the 8 percent requirement.

The record does contain certain personal accusations that Respondent Sarsfield intentionally resisted adequate recapitalization of the bank. I reject these assertions, however, as the product of this personal animosity between directors, not adequately founded in

evidence.

Rather, I conclude that the entire Board, to include Respondent Sarsfield, fully intended to insure adequate capitalization of Sequoia National as required by the Consent Order. But for the retroactive adjustment made by the OCC, the bank would have remained fully capitalized as required.

I cannot conclude that this Respondent caused, brought about, or participated in the undercapitalization of the bank as a result of this adjustment to the capital account, and decline to conclude a cognizable violation of Article XV of the Order.

III. DISCUSSION OF LAW

Section 8 (i) of the Federal Deposit Insurance Act provides in pertinent part as follows:

> (2) (A) First Tier. Any insured depository institution which, and any institution-affiliated party who --
>
> (i) violates any law or regulation;
>
> (ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section;
>
> (iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or
>
> (iv) violates any written agreement between such depository institution and such agency, shall forfeit and pay a civil money penalty of not more than

> $5,000 for each day during which such violation continues.

12 U.S.C. § 1818 (I).

Obviously the principal issue here involves the alleged "violation" of the outstanding Consent Order, which is in fact a final order within the meaning of 12 U.S.C. § 1818 (i) (2) (A) (ii).

As set forth in my discussion above, I have concluded that Respondent Sarsfield is responsible, as are all members of the board of directors, for the ultimate noncompliance with Articles VI, VII, IX, XII, and XIII. I do not find these violations to be flagrant or intentional, for in my opinion the evidence demonstrates that substantial effort was undertaken to attempt compliance with the OCC mandates.

For the most part, the cited violations are a matter of degree, which I have considered in arriving at my decision. The Federal Deposit Insurance Act requires consideration of four factors in determining the assessment of penalties:

(1) The size of the Respondents' financial resources;

(2) The good faith of the Respondent;

(3) The gravity of the violation; and,

(4) Previous violations, and other matters justice may require.

I have considered each of these factors, to include the Respondent's financial resources, which are sufficient to pay the penalty assessed. I have considered the good faith of the Respondent, to include his efforts to assure compliance with the Consent Order;

his actions in withdrawing from active management of the bank to permit others to direct the institution's activities; and his attempts to install corrective measures at the Sequoia National Bank.

I have considered the gravity of the violations, which for the most part are technical in nature, and deal with the degree or sufficiency of compliance, as opposed to an outward refusal or intentional decision not to comply. I have considered that these violations, in conjunction with other problems, resulted in serious decline of the institution's health, and resulted in unsafe and unsound banking conditions.

I have considered the previous violations, which are extensive, and are well-documented in the various examination reports concerning the Sequoia National Bank. I have considered the Respondent's motivation in achieving compliance with the Order, and the factional division with which the Board of Directors of this institution unfortunately operated. Considering the totality of the circumstances, I recommend that Respondent Sarsfield be assessed civil money penalties in the amount of $10,000.

Accordingly, I enter the following Findings of Fact, Conclusions of Law, and Proposed Order.

IV. FINDINGS OF FACT

I. Jurisdiction

1. At all times relevant herein, Sequoia National Bank, San Francisco, California, was a national banking association chartered and examined by the Office of the Comptroller of the Currency, pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 et seq. (Admitted: Answer to Notice of Assessment of a Civil Money Penalty ["Notice])

2. At all times relevant herein, Respondent Sarsfield served as a director and/or officer of Sequoia, and was an institution-affiliated party within the meaning of 12 U.S. C. §§ 1813(u) and 1818 (i). (Admitted: Answer to Notice)

3. At all times relevant herein, Respondent served as Chairman of the Board of Directors of Sequoia. (OCC exhibit 43, p. 7; OCC exhibit 38, p. 1; OCC exhibit 33, p. 1; OCC exhibit 27, p. 1; OCC exhibit 12, ppg. 1-3; OCC exhibit 36, p. 1; OCC exhibit 21, ppg. 2-3; Sarsfield TR 273)

II. Respondent's Duties

4. Until September 1992, Respondent served as an executive officer of Sequoia, by managing the Bank. (OCC exhibit 43, p. 7)

5. Respondent's role was reduced by on August 24, 1992, with Director Granholm becoming interim president. (OCC exhibit 21)

6. After September 1992, Respondent maintained a management position on the Board of Directors of

Sequoia. (OCC exhibit 43, ppg. 6-7; OCC exhibit 141, p. 13; OCC exhibit 30, p. 1; OCC exhibit 36, p. 4; OCC exhibit 37, p. 2; Henning TR 791-796)

7. From August 1992 onward, Respondent was also a paid consultant of Sequoia. (OCC exhibit 43, p. 7; OCC exhibit 21, p. 2; Sarsfield TR 273)

8. Respondent continued his role in Bank management. He reviewed and made recommendations respective to customer overdrafts with Bank staff, and was involved with the day-to-day operations of the Bank for the period at least until December 14, 1992, making executive decisions. (OCC exhibit 140, p. 36; OCC exhibit 37, p. 2).

9. The Bank had a Compliance Committee of its Board of Directors, as of April 1992. (Sander TR 45).

10. During 1992, the members of the Compliance Committee were Directors Bolles, Puccinelli, Henning, and Bray. (Sander TR 46)

11. The Compliance Committee kept minutes of its meetings, which the examiner-in-charge of Sequoia, Raymond Sander, reviewed as part of his duties. (Sander TR 46)

12. Douglas N. Akay is an attorney who provided legal advice to the Compliance Committee. (OCC exhibit 35, p. 2; OCC exhibit 36, p. 1; OCC exhibit 37)

13. Director Bolles wrote a memorandum to Attorney Akay, on December 14, 1992, which stated that, although his responsibilities had been formally reduced, Respondent Sarfield

was still in charge of the Bank as of December, 1992. (OCC exhibit 36)

14. Between June 30, 1992 and December 31, 1992, two distinct factions arose on Sequoia's Board of Directors. (OCC exhibit 43, p. 7)

15. Respondent was a member of the majority faction, which had the ability to outvote the members of the minority faction. (Sarsfield TR 542-547)

16. After three members of the minority group of directors left the Board, the Board was unified behind Respondent. (OCC exhibit 141, p. 10; Bolles TR 825-828).

17. Respondent appears to have maintained a dominant position on the Board of Directors after September 1992 through interlocking relationships with a majority of other Board members. (Henning TR 791-796; OCC exhibit 36, p. 4)

III. Sequoia's Background

18. Sequoia underwent a comprehensive OCC bank examination as of February 29, 1988 examination. (OCC ex. 154).

19. The OCC examiners expressed concern at this examination about Sequoia's reliance on volatile liabilities, its reserve allocations, its Allowance for Loan and Lease Losses (ALLL); and its loan portfolio supervision. (Sander TR 34; OCC exhibit 154, p. 3)

20. As a result of this examination the Sequoia Board of Directors was cautioned to reduce its reliance on volatile

funds exceeded reasonable proportions, and to better document is ALLL methodology (OCC exhibit 1, p. 2-3; Sander TR 34)

21. The overall condition of the bank was satisfactory, and the institution was assigned a camel rating or 2. (OCC exhibit 154)

22. The bank was next examiner as of March 31, 1990. (OCC exhibit 2, p. 2)

23. The results of this examination concluded that Sequoia maintained an extreme reliance on volatile funds, and needed to develop a greater core deposit base. (OCC exhibit 2, p. 1)

24. The OCC was additionally concerned about Sequoia's ALLL methodology, and an upward trend in problem loans. (Sander TR 35; OCC exhibit 2, ppg. 1 and 3; OCC exhibit 2, p. 2 of June 12, 1990 letter to Board)

25. The examination noted that Sequoia had not implemented recommendations made by the OCC in its previous examination concerning a reduction in volatile liability dependence, and a plan to detail how core deposits would be attracted. (OCC exhibit 2, p. 1)

26. The overall condition if the Bank remained satisfactory, however, and the institution was again assigned a camel rating or 2. (OCC exhibit 2)

IV. Review Prior to the July 31, 1991 Examination

27. In July 1991, the OCC made an unscheduled request for information from the Bank. The information was used to assess the Bank's liquidity situation. (OCC exhibit 5; Sander TR 39)

(ER 52)

28. This review found that the Bank's liquidity position when compared with that of peer institutions was very poor. (OCC exhibit 5, p. 3)

29. The report of this review notes that senior management's plan to use a Federal Home Loan Bank ("FHLB") line for primary liquidity was unsatisfactory. (OCC exhibit 5, p. 3)

30. The report of this review required the Bank to develop a liquidity contingency plan. (OCC exhibit 5, p. 4)

31. The report of this review required the Bank to revise its strategic plan to address liquidity and deposit composition, and to have well defined goals, objectives and action plans. (OCC exhibit 5, p. 4)

V. The July 31, 1991 Examination

32. Sequoia National was next examined as of July 31, 1991. The results of this examination found significant deterioration in the Bank's overall condition, including concerns with major CAMEL components of the Bank. (Sander TR 36)

33. The examiners noted that concerns expressed at prior examinations, involving inadequate cash flow analysis, problem loan identification , and the ALLL methodology, had not been resolved. (OCC exhibit 4, p. 8)

34. The examination noted that the Bank's ALLL methodology was flawed, and did not take into account all of the factors of Banking Circular 201. (OCC exhibit 4, page 2)

35. The July 31, 1991 examination of Sequoia noted that serious weaknesses in loan administration had not been

addressed. (OCC exhibit 4, p. 2)

36. The July 31, 1991 examination of Sequoia noted that the Bank had ineffective loan portfolio supervision, including liberal underwriting, an inability to detect problem loans, and a failure to ensure insider legal compliance. (OCC exhibit 4, p. 9)

37. The July 31, 1991 examination of Sequoia noted that the Bank's unacceptable lending practices included a failure to identify and document sources of repayment, a failure to adequately analyze borrower repayment ability, financial condition and credit history, a failure to properly document credit files to reflect significant developments, and a heavy reliance on junior liens when the prior liens exceed the Bank's lending limit and the Bank's equity position is questionable. (OCC exhibit 4, p. 9)

38. Sequoia's July 31, 1991 examination noted that the Bank's problem loan identification was poor, and that the system did not properly recognize deteriorating loans. (OCC exhibit 4, p. 9)

39. The July 31, 1991 examination of Sequoia noted that the Bank had 19 instances where management failed to note loans containing significant weaknesses. Twelve of the loans were misclassified by two grades. (OCC exhibit 4, p. 10)

40. The July 31, 1991 examination of Sequoia noted that the inadequacy of the loan policy at the Bank was a concern. (OCC exhibit 4, p. 9)

(ER 52)

41. The July 31, 1991 examination of Sequoia noted that liquidity was very poor based upon the current ratio of liquid assets to interest-sensitive liabilities, when compared to peer group. (OCC exhibit 4, p. 6)

42. The July 31, 1991 examination of Sequoia found the Bank's liquidity position to be a serious concern, with elements present that could lead to insolvency. (OCC exhibit 4, p. 6)

43. Sequoia was cited for an over-reliance on volatile liabilities at the July 31, 1991 examination. (OCC exhibit 4, p. 6)

44. The July 31, 1991 examination of Sequoia noted that the Bank was extremely vulnerable to even modest reductions in out-of-area deposit sources. (OCC exhibit 4, p. 6)

45. The July 31, 1991 examination of Sequoia noted that the Bank's FHLB secured line was not considered a solution to Sequoia's liquidity situation. (OCC exhibit 4, p. 6)

46. The July 31, 1991 examination of Sequoia noted that capital adequacy has been jeopardized by deteriorating asset quality and over-reliance on volatile funding sources. (OCC exhibit 4, p. 2 of cover letter).

47. The July 31, 1991 examination of Sequoia noted that capital is vulnerable based on the large volume of marginal and inferior quality assets in the Bank. (OCC exhibit 4, p. 3)

48. The results of the July 31, 1991 examination, including the overall condition of Sequoia, and the review of the CAMEL components, were communicated to Respondent at that time.

(ER 52)

(OCC exhibit 4, cover letter; Sander TR 36)

49. The overall condition of the Bank was rated as unsatisfactory, and the institution was assigned a camel rating of 4. (OCC exhibit 4)

50. Prior to March 3, 1992, Respondent received written notice of the OCC's criticisms at the July 31, 1991 examination. (OCC exhibit 6; OCC exhibit 7)

51. Respondent was informed at the exit meeting for the July 31, 1991 examination that the OCC could use its supervisory enforcement powers in regard to Sequoia. (Sander TR 36)

VI. The Consent Order

52. Sequoia and the OCC entered into a Consent Order to Cease and Desist ("Consent Order"), which had an effective date of March 4, 1992. (Admission: Answer to Notice; OCC exhibit 8)

53. A meeting of the Board of Directors of Sequoia was held in March 1992, at which time the Board members signed the Consent Order. (Sander TR 41-43)

54. Respondent signed the Consent Order. (OCC exhibit 8, final page; Sander TR 43; Sarsfield TR 275). Respondent previously had opportunity to review the Consent Order with the OCC. (Sarsfield TR 275)

55. OCC examiner Lori Pahler went over each of the Article requirements and informed Respondent, as well as the rest of the Sequoia Board, that it was the responsibility of the Board to

insure compliance with the Consent Order. (Sander TR 43-44)

56. Respondent understood that a director of a bank has an obligation to comply with a consent order entered into by the bank.

VII. Post-Consent Order Correspondence with the OCC

57. Respondent was put on notice as of April 7, 1992 that the OCC had not yet determined whether or not the deficiencies and weaknesses identified at the July 31, 1991 examination had been remedied. (OCC exhibit 9)

58. Respondent was put on notice as of April 7, 1992 that the Bank's loan policy failed to address the following specific Article IX loan policy requirements: Collection procedures; a prohibition on the use of brokered deposits; a conflict of interest policy; and guidelines for periodic review of the Bank's adherence to the revised lending policy. (OCC exhibit 9, p. 2)

59. Respondent was put on notice as of June 11, 1992 that the Bank's responses to the Consent Order had not provided the required development and implementation of a plan to improve the Bank's liquidity position. (OCC exhibit 10)

60. As of the date of that notice, June 11, 1992, the Bank had submitted only an analysis of various balance sheet scenarios, without sufficient discussions or conclusions. (OCC exhibit 10)

61. As of June 11, 1992, the Bank's liquidity contingency plan was inadequate, because it only restated the contingencies outlined in Article VII , paragraph 4, of the Consent Order, without discussion or conclusion of how these contingencies relate to the Bank's current condition, or how they would provide a realistic plan of action to meet liquidity needs in the event of a liquidity crisis. (OCC exhibit 10, p. 2; Sarsfield exhibit 2, liquidity section, p. 6)

62. As of June 11, 1992, management was criticized for citing, in April and May communications with the OCC, that positive liquidity factors were two times negative factors, without supporting whether or not this figure was adequate. (OCC exhibit 10, p. 2; Sarsfield exhibit 1)

63. As of June 11, 1992, the Bank's responses to the requirements of Article VII of the Consent Order were also criticized, for failing to include discussions or conclusions, and for failing to include a plan to reduce the Bank's reliance on volatile liabilities or to establish limitations on the use of volatile liabilities as a funding source. (OCC exhibit 10, p. 2, Sarsfield exhibit 2, Article VII section)

64. As of June 11, 1992, management was again informed that the FHLB credit line is not "self-liquidating," and that the assets securing the line were not considered liquid assets. (OCC exhibit 10)

65. As of June 11, 1992, management continued to use a liquidity parameter of a 15% ratio of net available funds to

liabilities, which was not supported by the Bank. (OCC exhibit 10)

66. As of July 8, 1992, and as a result of the July 11, 1992 letter (OCC exhibit 10) and its own concerns, the Bank's Compliance Committee determined to look to an outside expert to independently assess the Bank's liquidity. (OCC exhibit 11)

VIII. The June 30, 1992 Examination

A. The Examination

67. An examination of the Bank was conducted as of June 30, 1992. (OCC exhibit 12; Sander TR 47-48)

68. The examiners reviewed each of the Articles of the Consent Order for compliance at this examination. (Sander TR 48-49)

69. The June 30, 1992 examination concluded that the Bank was not in compliance with the Consent Order as a whole. (Sander TR 49)

70. The examination concluded that the condition of the Bank was poor and continued to deteriorate. (OCC exhibit 12, p. 1)

71. The June 30, 1992 examination found that Respondent had not effectively guided the Bank's planning efforts. (OCC exhibit 12, p. A-1)

72. The Bank was assigned a composite CAMEL rating of "5" at this examination. (OCC exhibit 12, p. 2)

73. A rating of "5" is reserved for institutions with an extremely high immediate or near term probability of failure. (OCC exhibit 12, p. 2)

74. The June 30, 1992 examination concluded that the Bank was in noncompliance with Articles VI, VII, X, XII and XIII of the Consent Order. (OCC exhibit 12, ppg. A-15 to A-18.)

B. Liquidity and Volatile Liabilities

75. The examination noted that use of a 15% liquidity ratio is not, in and of itself, an acceptable indicator of sufficient liquidity to sustain current operations and withstand any anticipated or extraordinary demands against the Bank's funding base. (OCC exhibit 12,
p. A-15)

76. The examination noted that the Bank's response to the Consent Order lacked the required details for compliance with Article VI, including analysis and conclusions. (OCC exhibit 12, p. A-15)

77. The examination noted that the Bank's contingency plan under Article VI was inadequate, since it restated possible contingencies outlined in the Consent Order, and failed to provide discussions or draw conclusions as to how those contingencies relate to the Bank's current condition, or to provide a realistic action plan for a liquidity crisis. (OCC exhibit 12, p. A-15)

78. The examination noted that the Bank's submissions under Article VII of the Consent Order failed to conclude how, or from what source, alternative funding would be developed, failed to address how the Bank would reduce reliance on volatile liabilities, and failed to establish limits on the use of volatile liabilities as a funding source. (OCC exhibit 12, p. A-15)

79. The examination noted that reports submitted by the Bank for April 8, May 8, June 8, and July 7, 1992 did not adequately address specific alternate funding sources to replace volatile liabilities, which continue to represent over 70% of the Bank's liability structure.
(OCC exhibit 12, p. A-15)

C. Loan Policy

80. The examination noted that the Bank's loan policy, submitted in compliance with Article IX of the Consent Order, did not contain: requirements for updated financial information for problem loans and equity line reviews; adequate guidelines for loan distribution or concentration; specific limits for insider transactions; quarterly loan reviews; a proper loan charge-off guideline; a requirement to document the specific loan purpose on the Bank's loan report forms; a requirement to link maturities with repayment sources; the Banking Bulletin 91-19 definition of "in process of collection;" loan to value ratios for commercial loans, land loans, and stand-by letters of credit; and a responsibility for compliance with policy. (OCC exhibit 12, p. A-16)

81. Specific limits for insider transactions were needed due to the Bank's longstanding problem with insider transactions. (OCC exhibit 12, p. A-16; OCC exhibit 4, p. 5)

D. Loan Portfolio Review

82. The examination concluded that the Bank failed to implement an effective loan review program under Article X within 60 days. (OCC exhibit 12, p. A-16)

83. The loan review program in effect at the Bank did internally review the bank's loans, and did assign an internal classification rating to the various assets.

84. The OCC examiners disagreed with several of the bank's internal classifications.

85. The examination graded a $336,953 loan to borrower Californian Properties, guaranteed by Director Norman I. Krug, as "doubtful." (OCC exhibit 12, p. A-31)

86. The examination graded a $409,500 loan to Borrower F as "doubtful."[3] (OCC exhibit 12, p. A-35)

87. The examination downgraded a $302,076 loan to Richard and Theresa Krug, the parents of Director Norman I. Krug, to "substandard." The Bank had graded the loan "Other Asset Especially Mentioned." (OCC exhibit 12, p. A-38)

E. Allowance for Loan and Lease Losses

88. The examination noted that the Bank's ALLL methodology remained unacceptable, was an unreliable indicator of

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[3] The OCC and Respondent agreed to use a code throughout the hearing to prevent disclosure of the names of third party borrowers not affiliated with the Bank. These third parties were referred to by the first letters of their last names, or by initials.

ALLL adequacy, and did not comply with BC-201. (OCC exhibit 12, p. A-17)

89. The OCC directed the Bank to add $250,000 to its ALLL at the June 30, 1992 examination. (OCC exhibit 12, p. A-17)

90. The Following year the OCC permitted the bank to reduce the ALLL by $100,000. (TR 264)

F. Credit File Documentation

91. The examination noted that adequate and collateral documentation was still not being performed. (OCC exhibit 12, p. A-17)

G. Capital

92. The Bank was told at the June 30, 1992 examination that the use of liberal and unsubstantiated assumptions for the valuation of its Excess Servicing Fee Receivables ("ESFRs") overstated Bank capital. (OCC exhibit 12, p. A-12)

93. Examiner Sander told the Board to support the current value of the ESFRs before the December 31, 1992 examination. (Sander TR 731-732). The Bank was also told to document and justify the assumptions used in the ESFR valuation methodology.

94. Sequoia was informed prior to the June 30, 1992 examination of the need to justify its valuation of the ESFRs. (Henning TR 782-784)

H. Exit Reviews

95. The results of the June 30, 1992 examination as a whole were reviewed with Respondent on August 5, 1992. (OCC exhibit 12, p. 3; OCC exhibit 13, OCC exhibit 14, p. 2; Sander TR 49)

96. The results of the Loan Portfolio management review, and Sequoia's Loan Policy, were discussed with Respondent in July 1992. (OCC exhibit 151; OCC exhibit 153; OCC exhibit 14, p. 4; Sander TR 49)

97. The OCC told Respondent that loan administration and asset policy were poor, that risk ratings were substantially inaccurate, that asset policy was poor, that ALLL methodology was unacceptable, that ALLL balance was inadequate, and that financial statement exceptions, collateral exceptions, and credit administration exceptions were excessive. (OCC exhibit 151; OCC exhibit 14)

98. The OCC told Respondent that the Sequoia's loan policy was not adequate, that it was difficult to find information on the policy, and that the OCC required one resource manual. (OCC exhibit 14, p. 6)

99. Respondent was present at an August 10, 1992 meeting conducted by the OCC examiner Raymond Sander. (OCC exhibit 15)

100. At the August 10, 1992 meeting, the OCC noted that the Bank needed to immediately increase the ALLL to $1 million, pending development of a satisfactory methodology. (OCC exhibit 15, p. 4; OCC exhibit 18)

IX. Failure of the Loan and Investment Committee to Act

101. Sequoia had a Loan and Investment Committee during 1992. (Sander TR 53; OCC exhibit 17)

102. Respondent was a member of the Loan and Investment Committee. (OCC exhibit 64; Sander TR 53-54)

103. On July 28, 1992 the Bank's Compliance Committee sent a memorandum to Sequoia's Loan and Investment Committee. (OCC exhibit 17)

104. The memorandum recited that Sequoia was found by the OCC to be in material non-compliance with many of the lending provisions of the Consent Order. (OCC exhibit 17)

105. The Compliance Committee sent a letter to Raymond Sander on August 10, 1992, in which they stated that neither the Board nor management of the Bank had demonstrated the ability to properly supervise the loan portfolio. (OCC exhibit 18)

106. The Compliance Committee noted in the memorandum that the Bank had perhaps spent too much time concentrating on collection and not policy. (OCC exhibit 18)

107. At its August 24, 1992 meeting, the Compliance Committee noted that the findings of a consultant hired to review the Loan Portfolio reinforced comments made by the OCC at their exit review. (OCC exhibit 20; OCC exhibit 21, p. 5)

108. On November 23, 1992, the Compliance Committee sent a memorandum to the Loan and Investment Committee noting that there had been an insufficient reply to a July 28 1992 request by the Compliance Committee to the Loan and

Investment Committee to address certain items. (OCC exhibit 31; OCC exhibit 36, p. 4)

109. The Compliance Committee noted that the Loan Policy, the ALLL methodology, the vague problem loan reports, financial statement exceptions and poorly documented repayment sources had not been the subjects of a response by the Loan and Investment Committee. (OCC exhibit 31; OCC exhibit 36, p. 4)

110. When confronted in November 1992 with the failure to respond to these concerns, members of the Loan and Investment Committee denied any knowledge of the Compliance Committee's concerns. (OCC exhibit 36, p. 4)

111. When the Compliance Committee attempted to report on their concerns to the Board, Respondent cut the report short. (OCC exhibit 36, p. 4)

X. OCC Action Between the June and December 1992 Examinations

112. Examiner Sander sent a letter to Sequoia's acting president on September 25, 1992. (OCC exhibit 22)

113. This letter communicated the OCC's concern that the Cabell Loan Review Report did not provide Sequoia with a revised ALLL methodology, and did not reach a conclusion on the level of insider compliance. (OCC exhibit 22, p. 1)

114. Sander noted in his letter that Sequoia must have a well documented re-payment plan by September 30, 1992 for the loans to borrowers Krug and F, or risk charge-off of the assets.

(OCC exhibit 22, p. 2)

115. Representatives of the OCC met with the Board on October 23, 1992. (OCC exhibit 25; Sander TR 57)

116. This meeting was called by examiner Sander to follow up on credit issues involving the Borrower F and Californian Properties loans, and Sequoia's liquidity position. (Sander TR 57)

117. At the October Board meeting, Respondent opposed an effort by some directors to charge-off the loan to Borrower F. (OCC exhibit 36, p. 4)

118. The OCC had previously insisted that the loan to Borrower F be charged off. (OCC exhibit 36, p. 4)

119. Director Granholm failed to recommend to the Board that the loan to Borrower F be charged off, on the advice of Respondent. (OCC exhibit 140, p. 36)

120. Acting President Granholm informed examiner Sander at this meeting that he had not had a chance to meet with the Bank's consultant on the liquidity issue. (Sander TR 58)

121. An examination of Sequoia's liquidity position was conducted in October 1992. (OCC exhibit 39; Sander TR 61)

122. The October 1992 examination of Sequoia's liquidity position determined that liquidity insolvency remained a possibility, that management and the Board had been unable to change the volatile deposit mix, and that loss of access to "money desk" funding would result in a liquidity crisis after the end of the

year. (OCC exhibit 39, p. 1)

123. Respondent believed in September 1992 that Sequoia's liquidity position was such that a liquidity problem could arise in December 1992 and January 1993. (OCC exhibit 40; Sander TR 61-62)

124. An examination of Sequoia's liquidity position was conducted in December 1992, prior to the examination. (OCC exhibit 41, Sander TR 62-63)

125. This examination concluded that, if Sequoia continued to allow the runoff of maturing out-of-area certificates of deposit ("CDs") it would run out of operating funds in March 1993. (OCC exhibit 41, p. 1)

126. The December 1992 liquidity review concluded that Sequoia lacked direction and that, contrary to the indication in Sequoia's budget, the Bank had not sold part of its commercial loan portfolio by December 1992. (OCC exhibit 41, p. 2)

XI. The December 31, 1992 Examination

127. An examination of Sequoia was conducted as of December 31, 1992. (OCC exhibit 43)

128. National Bank Examiner Sander served as examiner in charge of this examination. (OCC exhibit 43; Sander TR 64)

129. The onsite portion of this examination lasted for approximately three weeks. (Sander TR 64)

130. There were approximately seven OCC examiners present at the examination, as well as participants from the

FDIC (Sander TR 64)

131. All of the Bank's CAMEL rating components were assessed at this examination. (Sander TR 65)

132. The examiners reviewed each of Article of the Consent Order for compliance, and found noncompliance with the Consent Order as a whole. (Sander TR 65)

133. The examination concluded that the condition of the Bank was critical, and that it remained a seriously troubled institution. (OCC exhibit 43, p. 1)

134. Sequoia was assigned a composite CAMEL rating of "5." (OCC exhibit 43, p. 3)

135. The rating of "5" meant that the Bank was a failure candidate, with imminent failure a possibility. (Sander TR 65)

136. The examination concluded that Sequoia was in noncompliance with Articles VI, VII, IX, X, XII, XIII, and XV of the Consent Order. (OCC exhibit 43, ppg. A-1 to A-17)

XII. Liquidity and Volatile Liabilities

137. Article VI of the Consent Order required that Sequoia immediately increase or maintain liquidity at a level sufficient to sustain current operations and to withstand any anticipated or extraordinary demand against its funding base, and to develop a program to improve the Bank's liquidity position, with a monthly liquidity analysis, all within forty-five (45) days. There is also a reporting requirement, and a requirement that a liquidity contingency plan be developed within sixty (60) days of entering into the Consent Order. (OCC exhibit 8, ppg. 9-11; Sander TR 66)

138. Article VII of the Consent Order required that within thirty (30) days, the Bank adopt and implement a plan, with specific timeframes, to reduce reliance on volatile liabilities through the development of alternative funding sources, and to establish reporting requirements dealing with volatile liabilities. (OCC exhibit 8, ppg. 11-12; Sander TR 67)

139. Sequoia's liquidity was found to be poor at the December 31, 1992 examination, with no active funds management direction other than to cover running-off time deposits with new time CDs from the money desk, and to meet the cash letter. (OCC exhibit 44)

140. Sequoia's percentage of volatile deposits to overall deposits was 72% at the December 31, 1992 examination, the same percentage as at the previous examination. (OCC exhibit 45, p. 1; OCC exhibit 47; OCC exhibit 48; OCC exhibit 51; OCC exhibit 52; Sander TR 72-77)

141. Core deposits, such as demand deposit accounts, money market accounts, and negotiable early withdrawal accounts, are relied on to fund growth in a bank of satisfactory condition. (Sander TR 71)

142. Sequoia did not have core deposit base, and was unable to replace volatile deposits with core deposits. (OCC exhibit 45, p. 1)

143. At the December 31, 1992 examination, Sequoia's core deposits were under 20%, while its peer group was at 80%. This was of serious concern to the examiners. (Sander TR 78-

79; OCC exhibit 53, p. 9)

144. As of December 31, 1992, Sequoia had planned for over six months to sell home equity loans of $11 million to reduce dependence on volatile liabilities. The idea had not been consummated, however, because the files needed extensive work to be made saleable, and because the equity lines were earning assets. (OCC exhibit 45, p. 2). In spite of the August 1992 Board approval for selling loans, no effective action was taken. (OCC exhibit 156, p. 8)

145. Respondent's plan for reducing volatile liabilities (Sarsfield exhibit 37; Sarsfield TR 291-292) was merely a statement that assets should be sold, without any statement of how or to whom (Sarsfield exhibit 37). The "plan" was not implemented by December 1, 1992. (Sander TR 729)

146. Sequoia's secured line of credit with the FHLB cost Sequoia 4.14% in interest expense yearly, while Sequoia sold Fed Funds, equal to and exceeding the amount of the FHLB credit, that yielded under 3%. (OCC exhibit 45)

147. Sequoia's net interest margin declined consistently from 1989 to 1992, which was a negative trend, with one leading contributor to the decline being the Bank's reliance on volatile liabilities. (Sander TR 719-720)

148. Sequoia failed to adhere to the guidelines of its own funds management policy. (OCC exhibit 44, p. 1; OCC exhibit 45; OCC exhibit 62, p. 2; OCC exhibit 63; Sander TR 81-82, 89)

149. Sequoia's funds management policy required the Bank to have no brokered deposits, a liquidity ratio in excess of 20%, a loan to deposit ratio of less than 80%, a 90 day Rate Sensitive Asset/ Rate Sensitive Liability ratio ("RSA/RSL ratio") of .8 to 1.2, a gap to total assets ratio ("gap to TA") of 5%. Sequoia failed to meet any of these criteria, as the Bank had $3.45 million in brokered deposits, a liquidity ratio of 18%, a loan to deposit ratio of 95%, a RSA/RSL ratio of 1.44 and a 19% gap to TA at the December 31, 1992 examination review. (OCC exhibit 44, p. 1; OCC exhibit 63: Sander TR 81-82)

150. Examiner Sander had participated in approximately 60 examinations with the OCC. (Sander TR 32)

151. In examiner Sander's experience, Sequoia's attempt at funds management was probably the least successful that he had ever seen. Sequoia's excessively high level of interest rate risk continues to this day, its net interest margin has declined even further since December 31, 1992 (Sander TR 722-723), and the Bank is being "bled to death" by an over-reliance on volatile liabilities. (Sander TR 731)

XIII. Bank Responses to the Consent Order

152. Sequoia's responses to the Consent Order contained no liquidity contingency plan describing what would happen if volatile funds left the Bank, i.e., the timing of what would happen and what sources of funds would be used. The responses had no worst case scenario. (Sander TR 723-725; Sarsfield exhibit 5; Sarsfield exhibit 6)

(ER 52)

153. Sequoia's responses to the Consent Order did not specifically address interest-rate risk. (Sarsfield TR 711-715)

154. Examiner Sander reviewed Bank's Consent Order report, and found that the report contained schedules, but did not address the central theme of the Bank's reliance on volatile liabilities as a percentage of total deposits. (Sander TR 721; Sarsfield exhibit 5)

155. Sequoia's historical method of monitoring its liquidity position did not produce an accurate reflection of the Bank's liquidity position. (Sander TR 79-80; OCC exhibit 54)

156. A sources and uses type of format projects a bank's sources of funding and uses of funds over the near term, so it has a better understanding of what its liquidity needs will be. (Sander TR 80)

157. The OCC recommended to Sequoia at the June 30, 1992 examination that it adopt a sources and uses approach to liquidity. (Sander TR 80)

158. At its October 26, 1992 meeting, Sequoia's Compliance Committee noted that it needed to focus on encouraging management to provide a comprehensive and continuous system for monitoring liquidity. (OCC exhibit 26, p. 2)

159. At the October 28, 1992 meeting, the Board of Directors noted that volatile deposits would be a significant problem for the Bank in 1993, and that Respondent had been designated as responsible for shareholder/customer and public relations by the Board. (OCC exhibit 28)

160. At the November 24, 1992 Board meeting, it was noted that the Bank's projection showed a liquidity shortfall of close to $5 million through the end of April 1993, with a significantly higher need for liquidity beyond that. (OCC exhibit 33, p. 8)

161. At its December 3, 1992 meeting, the Compliance Committee meeting noted that the management's November liquidity report evidenced little change from previous submissions, that the projections were flawed and that the acting president acknowledged that his assumptions were not proper for the projections. (OCC exhibit 35, p. 2)

162. During September, October and November 1992, liquidity methodology was unchanged or only modified from previous reports. (OCC exhibit 36, p. 3)

163. Financial information contained in Sequoia's December 16, 1992 Board Report demonstrated a liquidity shortfall of $6.6 million for December 1992, a liquidity shortfall of $5.5 million for March 1993 and a shortfall of $6.3 million for June 1993. (Sander TR 77 and 83; OCC exhibit 53, p. 10)

164. The same Board Report, on the next page, contained the Bank's historical statement of its liquidity position, a net liquid assets to net liabilities ratio of 20.67%. This is inconsistent with the projected shortfall information contained on the previous page, showing that the historical formula does not provide an accurate reflection of the Bank's liquidity. (Sander TR 84; OCC exhibit 53, p. 11)

A. Consultant Catalano

165. Jeanine Catalano was a consultant hired by Sequoia in July 1992, to independently confirm the Bank's liquidity, and to make recommendations to improve the Bank. (Sander TR 86-87)

166. The Compliance Committee noted at its August 13, 1992 meeting that Catalano had found that the Bank's Liquidity Position was not consistent with that of the Bank's peer group. (OCC exhibit 19)

167. The Board of Directors of Sequoia first received her findings in August 1992. (Sander TR 87; OCC exhibit 21, p. 5)

168. At its September 5, 1992 meeting, the Compliance Committee noted that Consultant Catalano had presented her liquidity findings, and that out-of-area deposits were a particular concern. (OCC exhibit 23, p. 2)

169. Catalano's formal report summarized that Sequoia's liquidity position was of serious concern, with relatively small core deposits and an asset composition that was not very diverse. The poor liquidity position exposed the Bank to the risk of being unable to meet unanticipated cash flow needs. (OCC exhibit 62, p.2)

170. Examiner Sander agreed with Catalano's summary. (Sander TR 87)

171. Catalano recommended that the Bank update its funds management policy, and incorporate the provisions of the

policy into a strategic plan. (OCC exhibit 62, p.2)

172. Sequoia failed to update its funds management' policy and incorporate it into a strategic plan by December 31, 1992. (Sander TR 87-88)

173. Catalano recommended that Sequoia develop a contingency plan while its restructuring was being conducted. The plan should address any and all sources of funds in priority order, that can be drawn upon to meet unanticipated uses, including unusual deposit withdrawals. Catalano advised that the plan should also include a detailed description of the Bank's internal monitoring system, and an external communications system to inform regulators, large depositors, the press, and others, of the Bank's condition. (OCC exhibit 62, p.2)

174. Sequoia failed to develop this contingency plan as of December 31, 1992. (Sander TR 88)

175. Catalano expected Sequoia to sell and/or collect $5 million in loans and use the funds to reduce its volatile liabilities in the several months following September 30, 1992. (OCC exhibit 62, ppg. l-2)

176. Examiner Sander believed that this $5 million in loans would be a portion of Sequoia's home equity loan portfolio. (Sander TR 88)

177. Sequoia failed to sell the $5 million in loans as of December 31, 1992. (Sander TR 88)

178. Respondent was present at the October 28, 1992 Board of Directors Meeting. (OCC exhibit 27)

179. At the October 28, 1992 Compliance Committee meeting, Consultant Catalano noted that the Bank's asset/liability policy needed to be updated, and recommended diversification of the loan types, because of a high concentration of loans in Southern California. (OCC exhibit 28)

180. Catalano noted that brokered and out-of-area deposits could be pulled out of the Bank by telephone, that interest rates were not that high, and that a contingency plan needed to be prepared in the event concentrations of out-of-area deposits were pulled from the Bank. (OCC exhibit 28)

181. On November 9, 1992, the Compliance Committee noted that Respondent was reluctant to move forward with the consultant's recommendations. (OCC exhibit 29)

182. Respondent provided the Compliance Committee with mixed reports on the adaptation of Catalano's proposed liquidity methodology. (OCC exhibit 30)

183. At its December 3, 1992 meeting, the Compliance Committee noted that Catalano had expressed a disinterest in working with Respondent. (OCC exhibit 35, p.2, Sander TR 56-57)

B. Conclusion

184. Sequoia failed to develop and implement a program within forty-five (45) days of entering the Consent Order, for improving its liquidity position. (Sander TR 89, 742)

185. Sequoia failed to insure that a liquidity contingency plan was developed within sixty (60) days of entering into the Consent Order. (Sander TR 89, 741-742)

186. Sequoia failed to establish time limits on the use of volatile liabilities within thirty (30) days of entering into the Consent Order, and had not established such time limits by December 31, 1992. (Sander TR 90, 742)

187. As of December 31, 1992, Sequoia had failed to develop and implement a program for improving its liquidity position, and its liquidity level was not sufficient to sustain its current operations, and withstand extraordinary demand against its base. (Sander TR 90). As of December 31, 1992, the Bank was not in compliance with Article VI of the Consent Order. (Sander TR 90; Henning TR 768). As of December 31, 1992, the Bank was not in compliance with Article VII of the Consent Order. (Sander TR 90)

XIV. Loan Policy

188. Article IX of the Consent Order required Sequoia to review and revise its written loan policy within sixty (60) days, to incorporate the guidelines from the Handbook for National Bank Examiners, to correct deficiencies noted in the Report of Examination, as well as fifteen additional items listed in the Consent Order. (OCC exhibit 8, p.13; Sander TR 91)

(ER 52)

189. It is important to have an adequate loan policy because lending is a major function of a bank, with the Board being required to provide direction to the bank's affairs. A loan policy establishes guidelines to which the lending staff may adhere. If they do not adhere, the board is responsible for noting those exceptions. (Sander TR 92)

190. Sequoia produced a written loan policy revision. (OCC exhibit 65; Sander TR 93)

191. Sequoia's written loan policy revision was deemed inadequate upon review by the OCC. (OCC exhibit 153; OCC exhibit 12, p.A-7; Sander TR 93-94)

192. Sequoia did not revise its loan policy again before the December 31, 1992 examination, except to add a section on appraisal policy. (OCC exhibit 64; Sander TR 93). As of December 31, 1992, Sequoia was in noncompliance with Article IX of the Consent Order. (OCC exhibit 43, p.15; Sander TR 93; Henning TR 776)

193. Sequoia did not produce an acceptable loan policy within sixty (60) days of entering into the Consent Order. (OCC exhibit 12, p.A-16; OCC exhibit 43, p.15; OCC exhibit 153; OCC exhibit 64; Sander TR 91-94).

194. In noncompliance with the Consent Order, the policy that was produced was not approved by the Board of Directors. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16)

195. In noncompliance with the Consent Order, the policy had no requirement for updated financial information for problem loans, or for equity line annual reviews. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

196. In noncompliance with the Consent Order, the policy had no loan-to-value guidelines for commercial loans, land loans or standby letters of credit. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

197. In noncompliance with the Consent Order, the policy had no linking of maturities with repayment source, inadequate guidelines for loan distribution, and unreasonable maximum limits for loan types. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

198. In noncompliance with the Consent Order, the policy had no limit for land loans and no concentration limits for land loans. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

199. In noncompliance with the Consent Order, the policy had no requirements for documentation of the specific purpose of loans, and no statement of who is responsible for compliance with the policy. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

200. In noncompliance with the Consent Order, the policy called for annual instead of quarterly loan reviews, did not have the new BB 91-19 definition of "in process of collection," and needed to change its charge-off guideline from "principal and

interest past due six months" to "principal and/or interest past due six months." (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

201. In noncompliance with the Consent Order, the policy had no loan administration program to correct identified weakness. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 65)

202. In noncompliance with the Consent Order, the policy had no insider loan limit specifics. (OCC exhibit 153; OCC exhibit 64; OCC exhibit 12, p.A-16; OCC exhibit 65)

203. Sequoia's loan policy did not contain a requirement for Federal Financial Institutions Examination Council insider related interest forms. (Sarsfield TR 568)

204. The Consent Order specifically required a written conflict of interest policy complying with, at a minimum, the requirements of 12 C.F.R. Part 215 ("Regulation O"). (OCC exhibit 8, p.14)

205. Sequoia's loan policy did not adequately address requirements on Regulation O. (Sander TR 94)

206. The absence of detail in Sequoia's loan policy required the reader to thus refer to additional resources in order to understand what the requirements of the loan policy were. (Sarsfield TR 578-79)

207. An insider conflict of interest policy was particularly important at Sequoia in light of the Bank's history of insider violations. (OCC exhibit 12, p.A-19, A-21-22; OCC exhibit 4, p.10; OCC exhibit 2, p.A-1; OCC exhibit 154, p.A-1)

XV. Loan Portfolio Review

208. Article X of the Consent Order required that within 60 days, Sequoia must formulate and implement an effective and independent loan review program for the purpose of assuring the timely identification of problem loans in the Bank's portfolio. Article X also required that quarterly review with monthly updates be provided to the board. (Ragus TR 176-177; OCC exhibit 8, ppg.15-16)

A. Loan Classification

209. Loan portfolio management was considered an important part of the examination because of the severe loan administration problems identified at the June 30, 1992 examination. (Ragus TR 173; OCC exhibit 74)

210. During the December 31, 1992 examination, the OCC's examiners reviewed 41 loans representing approximately $12 million in loan commitments, or about one-third of Sequoia's loan portfolio. (Ragus TR 173; OCC exhibit 74)

211. At the December 31, 1992 examination, the OCC's examiners found that Sequoia's asset quality was poor, with total criticized loans representing approximately 270% of capital and total classified loans representing approximately 163% of capital. The examiner downgraded loans to 10 borrowers.

212. The Bank incurred a substantial operating loss in 1992, the first such loss ever incurred by the bank in its entire history. (Ragus TR 174-176; OCC exhibit 43, ppg.11-12; OCC exhibit 74)

(ER 52)

213. The main element of a loan review program is that it accurately grade the loans in the bank's loan portfolio in order to identify problems, and to determine the amount of credit risk and loss potential in the portfolio. (Ragus TR 177)

214. Sequoia's loan review program did not grade loans in the exact same fashion as did the OCC examiners. (Ragus TR 177; OCC exhibit 43, p.15; OCC exhibit 74)

215. During the December 31, 1992 examination, the OCC directed that Sequoia downgrade 10 of the 41 loans reviewed, or 21% of the total loan sample, totaling $2,565,000. (Ragus TR 179; OCC exhibit 127)

216. The California Properties loan was an insider-related credit. The borrower is a related interest of Bank Director Norman Krug, who was also the guarantor on the credit. The source of repayment was cash flow from the Hotel Californian, which was insufficient to service the debt. The borrower was severely delinquent on the first deed of trust and real estate taxes, city taxes, payroll taxes, and the ground lease. At the time of the December 31, 1992 examination, the loan was also on nonaccrual. The Bank's only collateral was a security interest in the hotel's furniture, fixtures and equipment. The guarantor provided no financial support for the credit. (Ragus TR 180-184; OCC exhibit 43, ppg.25-26; OCC exhibit 82)

217. As of the time of the December 31, 1992 examination, Sequoia classified the $282,000 loan to California Properties as doubtful. During the examination, the OCC's examiners directed that the loan be charged off as a loss. (Ragus TR 182, OCC

exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129)

218. The Bank agreed to charge off the California Properties loan as a loss. (Ragus TR 184-185; OCC exhibit 152)

219. At the time of the December 31, 1992 examination, Sequoia did not classify the $86,500 loan to Borrower M. During the examination, the OCC downgraded the loan to substandard. (Ragus TR 187; OCC exhibit 43, p.24; OCC exhibit 128; OCC exhibit 129)

220. A substandard loan is a loan that contains well-defined weaknesses that could jeopardize payment of the debt. (Ragus TR 187)

221. At the time of the December 31, 1992 examination, there was no analysis of Borrower M's ability to obtain a construction loan and the borrower provided no financial support for the credit. (Ragus TR 185-188; OCC exhibit 108)

222. As of the time of the December 31, 1992 examination, Sequoia classified the $376,000 loan to Borrower L as other assets especially mentioned ("OAEM"). During the examination, the OCC downgraded the loan to substandard. (Ragus TR 192; OCC exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129)

223. At the time of the December 31, 1992 examination, the loan to Borrower L was delinquent and placed on nonaccrual. The property securing the loan was located in a fire-damaged area, which may have affected its marketability. The Bank had also initiated foreclosure proceedings against the borrower. (Ragus TR 190-193; OCC exhibit 101)

224. As of the time of the December 31, 1992 examination, Sequoia classified the $194,000 loan to Borrower F and the $164,000 loan to Borrower O as OAEM. During the examination, the OCC downgraded these loans to substandard. (OCC exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129; OCC exhibit 92)

225. As of the time of the December 31, 1992 examination, Sequoia did not classify the $263,000 loan to Borrower E. During the examination, the OCC downgraded the loan to substandard. (OCC exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129; OCC exhibit 87)

226. As of the time of the December 31, 1992 examination, Sequoia did not classify the $150,000 loan to Borrower B. During the examination, the OCC downgraded the loan to substandard. (OCC Exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129; OCC exhibit 81)

227. As of the time of the December 31, 1992 examination, Sequoia did not classify the $100,000 loan to Borrower PL. During the examination, the OCC downgraded the loan to OAEM. (OCC exhibit 43, p.24; OCC exhibit 128; OCC exhibit 129; OCC exhibit 106)

228. As of the time of the December 31, 1992 examination, Sequoia classified the loans to Borrower P, totaling

$450,000, as OAEM. During the examination, the OCC downgraded the loans to substandard. (OCC exhibit 43, p.24; OCC exhibit 128; OCC exhibit 129; OCC exhibit 111)

229. As of the time of the December 31, 1992 examination, Sequoia did not classify the $400,000 loan to Borrower G. During the examination, the OCC downgraded the loan to OAEM. (OCC exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129; OCC exhibit 94)

230. As of the time of the December 31, 1992 examination, Sequoia did not classify the $100,000 loan to the Borrower K Trust. During the examination, the OCC downgraded the loan to OAEM. (OCC exhibit 43, p.23; OCC exhibit 128; OCC exhibit 129; OCC exhibit 103)

B. Consultant Cabell

231. Sequoia hired Consultant Roger Cabell of JRC Associates to conduct loan reviews in July 1992 and December 1992. (Ragus TR 189; OCC exhibit 43, p.15; OCC exhibit 74; Henning TR 777). The Bank did not hire Cabell within sixty (60) days of entering into the Consent Order. (Henning TR 778).

232. At its September 5, 1992 meeting, the Compliance Committee noted that Consultant Cabell had stated that Bank policies needed to be restated on the policies and process of approving loans presented to the Loan Committee and Board. (OCC exhibit 23)

233. At its September 5, 1992 meeting, the Compliance Committee noted that Cabell had stated that loan expectations and the ratio of classified loans is high at the Bank, by twice as much, when compared to peer. (OCC exhibit 23)

234. In the December 1992 review, Consultant

Cabell reviewed 38 loans, including an update of 15 loans that were previously reviewed. (Ragus TR 190; OCC exhibit 120, p.1)

235. In the December review, Cabell recommended that the loan to Borrower E be downgraded from pass to substandard, the loan to Borrower L from OAEM to substandard and the loan to Borrower R be downgraded from pass to OAEM. (Ragus TR 190; OCC exhibit 120, ppg.2, 4b, 4c and 4d)

236. As of the time of the December 31, 1992 examination, the Bank had not taken downgrades on the loans to Borrower E or Borrower L. (Ragus TR 190; OCC exhibit 128)

C. Problem Loan Reports

237. Many of the Bank's problem loan reports lacked purpose and repayment source information, proper cash flow analysis, adequate action plans, and timeframes. They lacked events that would trigger an upgrade or a downgrade in the credit and sufficient support for the ALLL allocations for the problem loans. (Ragus TR 194; OCC exhibit 121)

238. Some of the reports contained stale financial information and inadequate analysis of financial information. (Ragus TR 194; OCC exhibit 121)

239. The loan report for the California Properties loan did not note the original purpose of the loan. It contained an inadequate cash flow analysis. There were no timeframes in the action plan, and the ALLL allocation was not supported. (Ragus TR 195; OCC exhibit 121)

240. There was no problem loan report for the

loan to Borrower M because the Bank rated it a pass. (Ragus TR 195; OCC exhibit 121)

241. The problem loan report for the loan to Borrower L contained an inadequate cash flow analysis. It did not explain or support the ALLL allocation and it contained stale financial information. (Ragus TR 195; OCC exhibit 121)

242. There were deficiencies in many of the problem loan reports for other borrowers as well. (Ragus TR 195; OCC exhibit 121)

D. Conclusion

243. The OCC's examiners discussed their loan portfolio management findings with Bank management during the December 31, 1992 examination and Bank management did not disagree with their conclusions. (Ragus TR 196; OCC exhibit 122)

244. The importance of having an adequate loan review is to accurately grade the loan portfolio to determine the amount of credit risk in the portfolio. (Ragus TR 197)

245. Sequoia did have a loan review program, though it did not classify all loans exactly as did the OCC examiners. (Ragus TR 197)

246. Sequoia did not violate Article X of the Consent Order, as its loan review policy made good faith, reasonable efforts, at detecting credit risk within the portfolio. (OCC exhibit 12, p.A-16).

247. A loan that has demonstrated weaknesses ultimately can pay off. In this particular case virtually all of the loans classified ny OCC examiners eventually paid in full. (Ragus TR 267)

248. If a classified loan is paid in full, that does not necessarily mean that the classification was wrong. Loan classification is a subjective practice upon which reasonable minds may differ. (Ragus TR 267)

249. Deference is accorded to those classifications determined by OCC examiners, and in this instance Sequoia National accepted each of those determinations.

250. The OCC has not demonstrated a material inadequacy with the Sequoia loan review policy, to warrant a finding of noncompliance with Article X of the consent Order.

XVI. Allowance for Loan and Lease Losses

251. Article XII of the Consent Order required that the Board establish a program for the maintenance of an adequate ALLL. (Ragus TR 197; OCC exhibit 8, ppg.19-20)

252. The purpose of an ALLL is to estimate potential loan losses that would be taken in the future. (Ragus TR 197)

253. The two main requirements for an effective ALLL are accurate grading or risk rating of the loan portfolio and use of reasonable loss factors for loans or pools of loans. (Ragus TR 198)

254. It is important for a bank to document its process because without such documentation, the examiners cannot determine whether the loss factors used are accurate or reasonable.

(Ragus TR 198)

A. ALLL Methodology

255. It was important for Sequoia to have an adequate ALLL methodology. (Ragus TR 209; OCC exhibit 43; OCC exhibit 134)

256. The Bank's ALLL methodology was criticized at five of the previous six examinations, including the June 30, 1992 examination. (Ragus TR 208; OCC exhibit 12, p.A-17; OCC exhibit 43, p.16; OCC exhibit 134)

257. Sequoia's ALLL methodology was not adequate. (Ragus TR 198; OCC exhibit 43, p.16; OCC exhibit 134)

258. The Bank's ALLL methodology was not a reliable indicator of ALLL adequacy. (Ragus TR 200; OCC exhibit 43, p.16; OCC exhibit 134)

259. The Bank's calculation of its ALLL was unsupported. (Ragus TR 200; OCC exhibit 43, p.16; OCC exhibit 134)

260. The Bank relied on the use of specific loss factors in its ALLL calculation. (Ragus TR 200; OCC exhibit 135; OCC exhibit 137)

261. A loss factor is a percentage that is multiplied by a loan or pool of loans and that is supposed to estimate the amount of loss potential for that specific loan or pool of loans. (Ragus TR 200)

262. For example, the Bank's methodology used loss factors of 0.2% to 0.7% for home equity lines; 0.2% to 0.3% for

conventional mortgages; and 0.4% to 1.5% for commercial real estate loans. (Ragus TR 201; OCC exhibit 135; OCC exhibit 137)

263. The Bank's ALLL Policy does not explain or otherwise provide any support for the percentages used as loss factors in calculating the Bank's ALLL. (Ragus TR 202; OCC exhibit 43, p.16; OCC exhibit 134; OCC exhibit 135; OCC exhibit 137)

264. The Bank used a special additional allowance in its ALLL calculation. (Ragus TR 202; OCC exhibit 135; OCC exhibit 137)

265. A special additional allowance is an addition to the ALLL above the amounts required by the specific loss factors. (Ragus TR 202-203; OCC exhibit 135)

266. The Bank used percentages from 0.05% to 0.25% for its special additional allowance, using a matrix that designates a specific percentage based on factors such as off-balance sheet and credit risk, delinquencies and nonaccrual loans and the type of loan. (Ragus TR 203; OCC exhibit 135)

267. Neither the Bank's ALLL Policy nor any other Bank record stated how the Bank calculated these percentages or provided any support for them. (Ragus TR 203; OCC exhibit 43, p.16; OCC exhibit 134;.OCC exhibit 135; OCC exhibit 137)

268. The Bank's ALLL Policy had not been approved by the Board, but it was in use at the time of the December 31, 1992 examination. (Ragus TR 203; OCC exhibit 134)

269. The Bank's ALLL methodology did not account for undisbursed commitments. (Ragus TR 207; OCC exhibit 134; OCC exhibit 135; OCC exhibit 137; OCC exhibit 138)

270. The Bank's ALLL methodology did not take into account the large size of some credits. (Ragus TR 207; OCC exhibit 134; OCC exhibit 135; OCC exhibit 137; OCC exhibit 138)

271. The Bank's failure to take into account the large size of some loans was a concern because the Bank had a portfolio of large loans. Thus the portfolio lacked diversification. The Bank also had many equity lines secured by second deeds of trust behind large first deeds of trust, or large prior liens. (Ragus TR 208)

272. The Bank's practice was to include an unallocated portion of its ALLL. At year end 1992, it was $62,000. (Ragus TR 207; OCC exhibit 134; OCC exhibit 137; OCC exhibit 138)

273. Nothing in the Bank's ALLL Policy or any other Bank record provided any explanation of how the unallocated portion of the ALLL was calculated or otherwise provided support for it. (Ragus TR 207; OCC exhibit 134; OCC exhibit 135; OCC exhibit 136; OCC exhibit 137; OCC exhibit 138)

B. Consultant Cabell

274. The Bank hired a consultant, JRC Associates, to assist them in developing an ALLL methodology. (Ragus TR 204; OCC exhibit 136)

275. At its September 30, 1992 meeting, the Compliance Committee noted that Consultant Cabell of JRC Associates found that there was still room for criticism by the OCC of the Bank's ALLL reserve methodology. (OCC exhibit 24)

276. The Bank's ALLL Policy did not address criticized loans. (OCC exhibit 134; OCC exhibit 135)

277. The Bank adopted Consultant Cabell's recommendations regarding the use of minimum loss factors for criticized loans. (Ragus TR 205; OCC exhibit 134; OCC exhibit 136; OCC exhibit 137)

278. Consultant Cabell recommended a minimum loss factor of 1.5% for loans graded "other mention;" a range from 4% to 15% for loans graded substandard; and a minimum loss factor of 50% for loans graded doubtful. (Ragus TR 205; OCC exhibit 136)

279. Neither Consultant Cabell's report, the Bank's ALLL Policy nor any other Bank record explained how the minimum loss factors for criticized loans were derived or otherwise provided support for the factors. (Ragus TR 205-206; OCC exhibit 134; OCC exhibit 135; OCC exhibit 136; OCC exhibit 137)

280. Other than higher loss factors for substandard loans, there was little or no improvement in the Bank's ALLL methodology from the time of the June 30, 1992 examination,

because the loss factors were unsubstantiated. (Ragus TR 208-209; OCC exhibit 43, p.16; OCC exhibit 134)

D. Respondent's Inadequate Responses

281. Sequoia's March 11, 1992 ALLL Report does not support Respondent's contention that the Bank was in compliance with Article XII of the Consent Order because it does not state an adequate basis for calculating an ALLL. (Ragus TR 752; Sarsfield exhibit 1)

282. The reliance on an analysis of collateral in determining the ALLL in Respondent's March 11, 1992 ALLL report was flawed because of the Bank's weak appraisal process. (Ragus TR 752; Sarsfield exhibit 1)

283. During the June 30, 1992 examination, the Bank was cited for five violations of the OCC's appraisal regulation. Many of the appraisals were stale and appraised the collateral at a time when property values in California were higher. (Ragus TR 752; OCC exhibit 12, p.A-23)

284. Sequoia's March 11, 1992 ALLL Report did not take the problems with the Bank's appraisal process into consideration and did not consider that some of the collateral should have been reevaluated either through new appraisals or by the Bank. (Ragus TR 752; Sarsfield exhibit 1)

285. In Sequoia's March 11, 1992 ALLL Report, both other mention loans and substandard loans had loss factors of 2.5%. This is illogical because, by definition, a substandard loan has a greater amount of risk, or greater loss potential than an other mention

loan. In other words, the loss factor for substandard loans should be higher than that for other mention loans. (Ragus TR 753; Sarsfield exhibit 1)

286. Sequoia's March 11, 1992 ALLL Report was flawed because it did not provide support for the various loss factors used and why they are appropriate for Sequoia. (Ragus TR 753; Sarsfield exhibit 1)

287. Sequoia's March 11, 1992 ALLL Report does not address undisbursed commitments. This is problematic because the Bank has committed to lend those funds to the borrower at the borrower's convenience. Even though they are undisbursed at the present time, they could be disbursed and could be part of a loan balance in the future. (Ragus TR 753-754)

288. Sequoia's June 30, 1992 ALLL Analysis does not support his contention that the Bank was in compliance with Article XII of the Consent Order. (Ragus TR 754; Sarsfield exhibit 5)

289. The conclusion in Respondent's June 30, 1992 ALLL Analysis was wrong. (Ragus TR 754; Sarsfield exhibit 5)

290. The conclusion in Sequoia's June 30, 1992 ALLL Analysis is that the ALLL should be $650,000. However, as of June 30, 1992, $650,000 was not sufficient to cover the Bank's loan losses for the fourth quarter of 1992 (Sarsfield TR 627-628), which were $692,000. In other words, the Bank's losses in the fourth quarter of 1992 alone exceeded the Bank's ALLL by $42,000. These losses were incurred shortly after the Respondent's June 30, 1992 ALLL Analysis was done. (Ragus TR 755; Sarsfield exhibit 5)

E. Conclusion

291. The OCC's examiners discussed the shortfall in the Bank's ALLL and the deficiencies with its ALLL methodology with Respondent Sarsfield, Director Puccinelli and Director Granholm during the June 30, 1992 examination. (Ragus TR 755)

292. During the June 30, 1992 examination, the Bank made a $100,000 provision to the ALLL after the meeting with the OCC's examiners and the OCC required an additional $250,000 provision when the Board meeting was held in August of 1992. (Ragus TR 756)

293. The Bank absorbed almost $700,000 in loan losses, added $100,000 to the ALLL voluntarily and was directed to add another $250,000 by the OCC in 1992. So, an adequate ALLL on June 30, 1992 should have been at least $1 million. (Ragus TR 756)

294. The OCC's examiners reviewed the Bank's ALLL methodology again at the December 31, 1992 examination and again found it to be inadequate. (Ragus TR 757; OCC exhibit 134; OCC exhibit 135)

295. It's the Board's responsibility to maintain an adequate ALLL and the way to do it is by having a reasonable ALLL methodology. (Ragus TR 763-764)

296. The Bank was not in compliance with Article XII of the Consent Order. (Ragus TR 208; OCC exhibit 43, p.16; OCC exhibit 134; OCC exhibit 135; OCC exhibit 137; OCC exhibit 138)

XVII. Credit and Collateral Exceptions

297. Article XIII of the Consent Order required the Board to obtain current and satisfactory credit information and proper collateral documentation on all loans. It also required the Board to obtain adequate credit information and analysis of such information on all new and renewed loans. (Ragus TR 209; OCC exhibit 8, ppg.20-21)

298. The Bank did not comply with Article XIII of the Consent Order. (Ragus TR 209; OCC exhibit 43, p.16; OCC exhibit 139)

299. Approximately 75% of the loans reviewed during the December 31, 1992 examination had exceptions that represented noncompliance with Article XIII of the Consent Order. (Ragus TR 211, OCC exhibit 43, p.16; OCC exhibit 139)

300. Of the 41 loans that were reviewed at the December 31, 1992 examination, 26 had financial statement and/or collateral exceptions and one loan had only a collateral exception. In all, 27 of the 41 loans reviewed had either a financial statement or a collateral exception in noncompliance with the Consent Order. Loans to three other borrowers were also in noncompliance with the Consent Order, for a total of 30 loans totaling approximately $9,150,000. (Ragus TR 213-214; OCC exhibit 139)

301. Many of the loans in noncompliance with Article XIII of the Consent Order were problem loans. The credit files for some of these problem loans did not have updated financial information and neither the credit files nor the problem loan reports contained adequate cash flow or repayment source analysis. (Ragus TR

214; OCC exhibit 139)

302. Of the six new loans or renewals reviewed at the December 31, 1992 examination, 4 had inadequate cash flow analyses. These were loans that were either made or renewed or extended after the date of the Consent Order. (Ragus TR 214-215; OCC exhibit 139)

303. The Bank had also been criticized at the June 30, 1992 examination for excessive financial statement and collateral exceptions. (Ragus TR 215; OCC exhibit 12, p.A-17)

304. It's important for a Bank to have updated financial information and appropriate analysis of that information in order to determine whether the repayment source for a loan is adequate and in order to monitor the credit. (Ragus TR 215)

305. The Bank's Board of Directors is ultimately responsible for proper management of the Bank and compliance with the Consent Order. (Ragus TR 268)

XVIII. Capital

306. Article XV of the Consent Order required that Sequoia maintain Tier 1 capital to risk-weighted assets of 8%, as well as a leverage ratio of 5%. (Sander TR 95; OCC exhibit 8, p.22)

307. At all times relevant herein, with one exception, the Bank maintained capital in excess of the 8 percent minimum required by the consent order.

308. As a result of certain adjustments made at the December 31, 1992, examination, the bank's tier 1 capital ratio dropped to 7.1 percent. (OCC exhibit 67; OCC exhibit 68; OCC exhibit 69; OCC

exhibit 73)

309. The sole reason for the decrease in the capital ratio was because of the OCC adjustments.

310. By May of 1993, Sequoia sold certain assets, and promptly replenished the capital account, curing the temporary shortage caused by the accounting adjustments ordered by the OCC. (Sarsfield exhibit 33)

311. Sequoia was not in violation of the tier 1 capital ratio set forth in Article XV of the Consent Order. (Sander TR 97; OCC exhibit 67, p.2)

XIX. Respondent's Ability to Pay

312. Respondent has the ability to pay the entire $15,000 assessment. (Joint exhibit 1)

V. CONCLUSIONS OF LAW

I. Jurisdiction

1. At all times relevant herein, Sequoia was an "insured depository institution" within the meaning of 12 U.S.C. §§ 1813(c) and 1818(i).

2. At all times relevant herein, the OCC was the "appropriate Federal banking agency" regarding the Bank, pursuant to 12 U.S.C. §§ 1813(q) (1) and 1818(i) (2) (E).

3. At all times relevant herein, Respondent served as a director of Sequoia, and was an "institution-affiliated party" of Sequoia within the meaning of 12 U.S.C. § 1813(u) and 1818(i).

II. As of December 31, 1992 Sequoia was in Noncompliance with the Consent Order

A. Liquidity and Volatile Liabilities

4. As of December 31, 1992, the Bank was in noncompliance with Articles VI and VII of the Consent Order.

B. Loan Policy

5. As of December 31, 1992, the Bank was in noncompliance with Article IX of the Consent Order.

C. Allowance for Loan and Lease Losses

6. As of December 31, 1992, the Bank was in noncompliance with Article XII of the Consent Order.

D. Credit and Collateral Exceptions

7. As of December 31, 1992, the Bank was in noncompliance with Article XIII of the Consent Order.

III. Respondent's Nexus to Sequoia's Noncompliance

8. Respondent caused, brought about, participated in, aided and abetted Sequoia's noncompliance with Articles VI, VII, IX, XII, and XIII of the Consent Order at the December 31, 1992 examination.

IV. The Penalty

9. A sufficient legal basis exists for the assessment of a civil money penalty against Respondent William C. Sarsfield in the amount of $10,000.

So Ordered, this 3rd day of February, 1995.

/s/ Arthur L. Shipe

ARTHUR L. SHIPE

Administrative Law Judge

Date: February 3, 1995

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC-AA-EC-93-144

IN THE MATTER OF William C. Sarsfield, Former Chairman of the Board and Current Director,
Kent D. Glover, Former President and Current Director,
Charles Puccinelli, Peter P. Bolles, Thomas J. Niedermeyer, Sr.,
Richard C. Van Valer,
Former Directors,
John F. Henning, Jr., Norman I. Krug, Current Directors
Sequoia National Bank, San Francisco, California

Proposed Order
Assessment of Civil Money Penalties

On November 20, 1993, the Comptroller of the Currency of the United States of America issued a Notice of Assessment of Civil Money Penalty against Respondent, William C. Sarsfield, former Chairman of the Board and Current Director of the Sequoia National Bank, San Francisco, California, charging him with violation of an order to cease to desist, issued pursuant to 12 U.S.C. § 1818(b).

The Respondent duly filed an Answer to the allegations in the Notice, and requested an administrative hearing pursuant to 12 U.S.C.

§ 1818(i), and the Comptroller's Rules of Practice and Procedure, 12 C.F.R. § 19.

The matter was heard before Administrative Law Judge Arthur L. Shipe during the period June 7 - 10, 1994, in San Francisco, California.

The Comptroller, having considered the evidence presented at the hearing, and the briefs and arguments of both counsel, and the Recommended Decision issued by the presiding Administrative Law Judge;

HEREBY ORDERS, that Respondent William C. Sarsfield be assessed a civil money penalty on the amount of ten thousand dollars ($10,000) .

Comptroller of the Currency

UNITED STATES OF AMERICA

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC-AA-EC-93-144

IN THE MATTER OF William C. Sarsfield, Former Chairman of the Board and Current Director,

Kent D. Glover, Former President and Current Director,

Charles Puccinelli, Peter P. Bolles, Thomas J. Niedermeyer, Sr., Richard C. Van Valer,

Former Directors,

John F. Henning, Jr., Norman I. Krug, Current Directors

Sequoia National Bank, San Francisco, California

CERTIFICATE OF SERVICE

The complete Record of the above proceeding consists of the following materials:

Two (2) Filed Volumes of Pre-Hearing Pleadings

One (1) Filed Volume of Post-Hearing Pleadings

Three (3) Hearing Transcripts with Exhibits

On February 3, 1995, I caused to be served upon the following parties, the matters described below.

By personal service, the complete original Record of this proceeding upon:

Hearing Clerk, Office of the Comptroller of the Currency
250 E Street SW
Washington, DC 20219

And by the same method, a copy of the Recommended Decision upon:

Mr. Michael G. Bloise, Esq.
Mr. Daniel P. Stipano, Esq.
Enforcement and Compliance Division office of the
Comptroller of the Currency
250 E Street SW
Washington, DC 20219

And by Federal Express Delivery, a copy of the Recommended Decision upon:

Mr. Michael W. McCann, Esq.
Cappello & McCann
831 State Street
Santa Barbara, California 93101

Dated this 3rd day of February, 1995, at Washington, DC.

/s/ Gerald J. Langan
GERALD J. LANGAN
Law Clerk to Judge Arthur L.
Shipe Administrative Law Judge

[Filed Aug. 12, 1994]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

No. AA-EC-93-144

IN THE MATTER OF: WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director; KENT D. GLOVER, Former President and Current Director; CHARLES PUCCINELLI, PETER P. BOLLES, THOMAS J. NIEDERMEYER, SR., and RICHARD C. VAN VALER, All Former Directors; JOHN F. HENNING, JR., and NORMAN I. KRUG, Current Directors, of SEQUOIA NATIONAL BANK, San Francisco, California

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Proposed Findings of Fact and Conclusions of Law by Respondent William C. Sarsfield

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Attorneys for Respondent
William C. Sarsfield

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Respondent William C. Sarsfield (hereinafter "Respondent") respectfully submits the following proposed findings of fact and conclusions of law in defense of the proposed civil money penalty assessment of $15,000 against him.

I

INTRODUCTION

The OCC has the burden of proving (1) that there was a material noncompliance with Articles VI, VII, IX, X, XII, XIII and XV of the March 3, 1992 Consent Order, (2) that Respondent caused, brought about, participated in, counseled or aided and abetted the material noncompliance, and (3) that consideration of the statutory factors in 12 U.S.C. § 1818(i) support the assessment of a $15,000 penalty against Respondent. (TP 18:21-19:3)[1]

Respondent respectfully submits that the OCC failed to introduce any substantial evidence of Sequoia National Bank's (hereinafter "Bank") noncompliance in any material respect with any of the Articles of the Consent Order which are at issue. Instead, the OCC introduced only the subjective "opinions" of non-compliance by its examiners (Mr. Sander and Mr. Ragus). However, those opinions were unsupported by a single credible objective factor. The OCC

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[1]All citations to testimony at the trial on June 6-10, 1994 are by reference to the page and line numbers in the Transcript of Proceedings which will be abbreviated "TP"; references to exhibits introduced into evidence by the OCC will be identified as "OCC 1" *et seq.*; Citations to Respondents exhibits will be referenced as "WS 1" *et seq.*

witnesses were unable to identify any specific objective criteria of noncompliance, and instead offered little more than semantic criticisms of the exhaustively detailed monthly reports prepared and submitted by Respondent (WS 1,2,3,4,5 and 6) in compliance with the Consent Order. These purely semantic criticisms amounted to nothing more than a classic case of elevating form over substance.

Respondent proved at trial that in several critical respects the OCC's conclusions of noncompliance were based on:

1. Review and analysis of outdated and superseded bank asset and liability management policies;

2. Reliance upon inaccurate and misleading "reports" surreptitiously supplied to the OCC by director Henning[2]; and,

3. Reports from the Bank's Compliance Committee prepared by director Bolles (and orchestrated by Henning) several weeks after Bolles had been dismissed from the Board of Directors.

Even more disturbing was the testimony of Henning offered by the OCC in which he candidly admitted that he was engaged since 1991 in a personal vendetta to "get rid of" Respondent (TP 797:15-19), in which he "got in bed" with the OCC as far back as 1991 for that purpose (TP 798:15-21), that he surreptitiously forged and submitted to the OCC false and misleading "reports" in OCC format

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[2] The court will recall Mr. Henning's bizarre behavior on the witness stand, exceeded only by the bizarre nature of his testimony in which he candidly admitted his hate of Respondent and his personal vendetta (in collaboration with the OCC) against Respondent from 1991 forward.

to disguise their real source (TP 784:3-789:14), and that he would do and say anything to get rid of Respondent (TP 808:13-809:3). In fact, when confronted at trial with the Report of the Special Litigation Committee of the Board of Directors at Sequoia National Bank (WS 36), which found Henning's denials of his breach of fiduciary duties as counsel to the Board of Directors to be "unconvincing" (TP 816:4-817:3; WS 36, at p. 45), Henning went so far as to exclaim that he was "proud of what they [the Board of Directors] said" (TP 819:4). He even claimed his breach of fiduciary duties to the Bank to be broader than his sordid involvement in secretly counseling an ex-Bank employee (Beverly Williams) to bring bogus legal claims against the Bank. (TP 818:9-12).

The OCC itself admitted in its Prehearing Statement that its two star witnesses (Henning and Bolles) were members of a minority faction on the Bank's Board which " . . . acted as a roadblock . . . taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices . . . The minority group . . . equated anything that was beneficial to the majority group with a detriment to the Bank. This simplistic mathematics ignores the reality that the primary duty of the minority group directors during the period of noncompliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the Board." (OCC Prehearing Statement pp. 10-11) This candid admission by the OCC that any alleged noncompliance was the result of the campaign waged by Henning and

Bolles (who were the driving force on the Compliance Committee during the relevant time period) to intentionally thwart Respondent's efforts to comply with the Consent Order is difficult to reconcile with the evidence that came out at trial of the "deal" between the OCC and Henning/Bolles to reduce their assessments from $5000 to $950, obviously designed to buy their "cooperation" and testimony (TP 803:7-806:3). In fact, in order to apply maximum pressure, the OCC held off actually signing the "deal" with Henning/Bolles until after they "performed" at the trial (TP 804:3-4). The OCC subsequently kept their part of this questionable "deal", filing the required notice of the settlement several weeks after the trial, as referenced in Mr. Bloise's correspondence to the Honorable Arthur L. Shipe, dated June 16, 1994. (Judicial Notice is requested of this correspondence, filed herein on or about June 16, 1994 and attached hereto as Ex. A.)

In sum, as the summary of evidence below will establish, the OCC failed to carry its burden of proof at the trial. Instead, the evidence demonstrated that the OCC instead allowed itself to become an accomplice in Henning's personal vendetta against Respondent, allowing itself to be misled by Henning's intentionally false forged "reports", and relying upon outdated documents.[3]

The OCC's case, so lacking in substance and credibility,

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[3] In fact, the OCC did not event attempt to refute Henning's revelation that in August of 1992 the OCC admitted to Bolles that their real purpose for the Consent Order was to get rid of Respondent. (TP 797:20-798:19).

stands in stark contrast to the exhaustive, detailed presentation of evidence by Respondent demonstrating his extraordinary efforts from March 3, 1992 forward to insure that the Bank complied with the Consent Order. Respondent reduced his salary 20%, and increased his hours to approximately 60 hours a week during this time period, while he worked almost exclusively to insure compliance. (TP 296:9-23). In August 1992, recognizing that the Henning/Bolles minority faction would continue to undermine the Bank's efforts at compliance with the Consent Order as long as he remained in office (which the OCC acknowledges in its Prehearing Statement), Respondent prepared a proposed "action plan" setting forth the direction the Bank should continue to take to insure compliance with the Consent Order, caused it to be adopted by the Board, and resigned from active participation in the management of the Bank. (TP 290:7-293:12). Within a few days Respondent was hospitalized, having lost approximately half his blood due to ruptured ulcers. (TP 298:1-10) The OCC's own witness (Bolles) admitted that the proposed action plan submitted by Respondent in August of 1992, if adequately implemented by management, would have responded to all the issues in the Consent Order. (TP 831:3-832:20).[4] At trial Mr. Sander

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[4] Interestingly, at trial Henning tried to usurp to himself credit for the action plan prepared and submitted to the Board by Respondent, even testifying that Respondent resisted implementation of that plan. (TP 770:1-771:3). This testimony was flatly contradicted by Henning's client and cohort Bolles. (TP 831:3-832:20).

admitted that there was never any occasion when he asked Respondent for any information that he failed to give, nor could he think of any example of ever asking Respondent to do anything that he refused to do. (TP 152:20-25). Mr. Ragus admitted that he was not dealing with Respondent on compliance issues after August of 1992. (TP 233:5-8). Mr. Sander admitted that Respondent was "no longer involved in management after August 1992 (TP 734:23-735:2) and was not "involved with the Compliance Committee or compliance with the Consent Order" as of December of 1992. (TP 104:19-22).

II

ARGUMENT AND PROPOSED FINDINGS

A. ISSUE NO. 1: Did the Bank Comply With Articles VI and VII of the Consent Order? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance.

ARGUMENT

In its Notice of Assessment with respect to Article VI, the OCC contends that Respondent caused, aided and abetted, etc. an alleged failure by the Bank ". . . to immediately increase or maintain the liquidity of the Bank to a level which was sufficient to sustain the Bank's current operations and to withstand any anticipated or extraordinary demand against its funding base; failed to develop and implement a program to improve the Bank's liquidity position within forty-five (45) days of entering into the Order; and, failed to ensure

that a liquidity contingency plan was developed within sixty (60) days of entering into the Order."

On Article VII, the OCC contends in the Notice of Assessment that Respondent caused, aided and abetted, etc. an alleged failure by the Bank ". . . to adopt and implement a plan, with specific time frames, to reduce the Bank's reliance on volatile liabilities through the development of alternative funding sources and failed to establish time limitations on the use of the volatile liabilities as a funding source within thirty (30) days of entering into the Order."

The OCC presented its case on Articles VI and VII through the testimony of Mr. Sander. Mr. Sander testified that the Bank was not in compliance with Articles VI and VII (TP 66-90). However, other than his own subjective "opinion" of noncompliance, Mr. Sander identified very few objective criteria/factors in support of that opinion. The few objective criteria he did rely upon turned out to be, by his own admission, seriously flawed.

For example, Mr. Sander identified OCC 63 as the "asset and liability management policy that was prepared by Sequoia National Bank", that he reviewed at the December 31, 1992 examination to conclude that the Bank was not in compliance with Articles VI and VII. (TP 81:2-19; TP 103:16-105:7).

On cross-examination, Mr. Sander acknowledged that OCC 63 had been prepared all the way back in 1986 and he was unaware that it had been substantially revised by the Bank in 1991. (TP 105:8-108:9). Mr. Sander agreed that if in fact OCC 63 had been substantially revised by the Bank in 1991, then the conclusions

reached by the OCC on Articles VI and VII based on that Exhibit were "flawed." (TP 108:10-23). Respondent thereafter established that OCC 63 was an outdated policy not in effect in 1992 and superseded by several Board resolutions updating the Bank's asset and liability management policy in 1991. (TP 338:11-340:16; WS 42; TP 494:4-495:18; WS 39). As a result, OCC 63, upon which the OCC had relied to conclude noncompliance with Articles VI and VII, was not even an operative document in the Bank in 1992.

In a similar vein, Mr. Sander admitted on cross-examination that OCC 141 (the "report" prepared by Bolles several weeks after being dismissed from the Board in March of 1993) was also relied upon by the OCC in preparing the December 1992 Report of Examination which led to the Notice of Assessment. (TP 110:15-111:10). Mr. Sander subsequently admitted that the OCC did not, but should have, taken into consideration the fact that OCC 141 was not an official Bank response, but a "report" by a "disgruntled and voted-out-of-office member of the minority faction of the Board", in deciding how much weight should have been given to the information in that document. (TP 113:18-114:13).[5]

Another objective factor that Mr. Sander identified as evidence of noncompliance with Articles VI and VII was the Bank's

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[5] In fact, much of the information in the Bolles "report" was false and misleading and obviously submitted in furtherance of the Henning/Bolles effort to enlist the OCC in their vendetta against Respondent. (TP 331:7-333:9; WS 24,25,26; TP 519:22-524:8; WS 29).

alleged failure to "sell and/or collect $5 million in loans." (TP 88:4-19). On cross-examination, Mr. Sander admitted to having no knowledge of the Bank having sold loans and acknow-ledged that he would have to reevaluate his conclusion of noncompliance if he learned that the Bank had in fact sold some loans in 1992. (TP 119:10-120:17).[6] On direct, Respondent identified the plan that was formulated immediately upon execution of the Consent Order for the sale of loans, and the fact that those loans were sold in 1992. (TP 347:6-350:17). Clearly Mr. Sander's opinions of noncompliance should be "reevaluated" in light of this important information of which he was inexplicably unaware.

With respect to the Bank's liquidity, Respondent presented evidence which established that the Bank maintained its liquidity at a level of 15% or higher throughout 1992. (TP 128:18-129:3). Mr. Sander admitted that the OCC never took the position that this 15% ratio was not adequate to maintain the liquidity of the Bank to a level sufficient to sustain the Bank's current operations. (TP 129:15-19). Instead, Mr. Sander clung steadfastly to his conclusion that the Bank did not maintain an adequate liquidity, without ever explaining why

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[6] For some reason Mr. Sander was himself confused regarding exactly what was required of the Bank under Article VI. At one point he testified that the Consent Order required the sale of loans within 45 days (TP 140:20-23) but then backtracked and stated that all that was necessary was that a "plan" for the sale of these loans be in place within 45 days. (TP 142:1-9).

he so concluded or how that conclusion could be substantiated.

In a similar vein, Mr. Sander testified that the only thing to his knowledge done by Respondent to comply with Article VII (dependence on volatile liabilities such as out of area deposits over $95,000) was that "he [Respondent] mentioned that he knew some of the borrowers and worked with them so that they would not withdraw their funds from the Bank." (TP 132:6-14; 134:23-135:5). Mr. Sander indicated that he was " . . . not aware of a significant reduction" in volatile deposits during 1992 attributable to Respondent's efforts. (TP 135:10-16). When confronted with the possibility that Respondent had in fact reduced volatile deposits at the Bank in 1992 by $8,000,000 (approximately 25%), Mr. Sander still would not agree that that represented a good faith effort by Respondent to comply with Article VII, although he could not come up with any specific dollar figure by which he contends Respondent should have reduced volatile deposits. (TP 137:2-20) Instead, Mr. Sander was forced to fall back on his own "interpretation" of Article VII ". . . to mean that there should be an analysis of what the maturity schedule for deposits means to the Bank, the impact of that." (TP 147:17-19). Mr. Sander contended that no such analysis was presented.

In response, Respondent went through a detailed explanation of those sections of the first monthly report following execution of the Consent Order (WS 1) showing exactly where that "analysis" was presented (TP 355:22-360:3). The relevant portions of WS 1 contained a section entitled "Analysis of The Continuing Availability

and Volatility of Present Funding Sources" (TP 356:12-14), analysis of when certain deposits were anticipated to mature or be withdrawn (TP 357:12-358:17), and an analysis of the impact of the sale of loans and the availability of lines of credit (TP 359:2-15). Respondent provided additional detailed analysis of the Bank's compliance with Articles VI and VII through a description of the subsequent monthly reports that he prepared and submitted to the OCC through August of 1992. (TP 386:17-404:11; 419:19-445:20; WS 1,2,3,4,5 and 6.)

In sum, the OCC did not carry its burden of proof with respect to the alleged noncompliance with Articles VI and VII. The only objective criteria they could point to were shown to be the result of reliance upon inaccurate "reports" sent in by ousted members of the "minority faction", and an outdated and inoperative Bank asset and liability management policy. In addition, Mr. Sander was shown to be inadequately informed with respect to most of what Respondent had accomplished in compliance with these Articles.

PROPOSED FINDINGS OF FACT

1. The Bank was in material compliance with Articles VI and VII of the Consent Order at all relevant times;

2. Respondent did not cause, bring about, participate in, counsel, or aid and abet any noncompliance.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against Respondent.

B. **ISSUE NO. 2: Did the Bank Materially Comply With Article IX? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance.**

ARGUMENT

With respect to Article IX, the OCC sought to prove at trial that Respondent caused, aided and abetted, etc. the Bank's alleged failure ". . . to revise its written loan policy within sixty (60) days of entering into" the Consent Order. (Notice of Assessment of Civil Money Penalty, I. 4, ¶ (5), attached hereto as Exhibit B and incorporated herein by this reference.)

At trial, the OCC conceded that the Bank had adequately revised the sections of its loan policy dealing with appraisal methodology. (TP 93:16-19). The evidence at trial thus focused only upon the Bank's efforts with respect to improving its written loan policies relating to the lending function at the Bank, and the OCC's criticisms thereof.

The Bank had hired Victor Granholm in 1991 for the specific purpose of developing revised loan policies which would satisfy the OCC. (TP 451:7-19). In January of 1992 the Bank had submitted a new revised loan policy. (TP 447:4-13; OCC 65). On February 26, 1992 Mr. Sander wrote to the Bank and in essence accepted the revised loan policy, with certain comments. (TP 405:22-406:2; OCC 7). At trial, Respondent identified in detail the provisions in OCC 65, the revised loan policy, dealing with the OCC's previous criticisms on

loan policy. (TP 407:2-419:9)[7]

On March 3, 1992, Respondent and other members of the Board met with the OCC. At that meeting, the OCC representatives acknowledged the Bank's material compliance with loan policy revision requirements, as confirmed by the minutes of that meeting. (TP 278:23-279:7; WS 35). On March 12, 1992 the Bank's counsel (Edward Mevi, who testified at trial) sent a letter to the OCC confirming their acknowledgment at the March 3rd meeting that the Bank was in compliance with Article IX. (TP 365:25-369:6; WS 16).

Following execution of the Consent Order (effective March 9, 1992), Respondent prepared and submitted the first required monthly report (WS 1) confirming the Bank's understanding, as expressed in the March 12, 1992 letter from Mr. Mevi (WS 16), that the Bank was already in compliance with Article IX. (TP 447:15-448:19). The April 8, 1992 report (WS 1) further acknowledged the Bank's understanding that the OCC had reserved the right to make further comments and observations on the Bank's loan policy. (Ibid.)

Later in April of 1992 the Bank received a letter from the OCC requesting certain additions to the loan policy. (TP 448:24-

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[7] This testimony, and OCC 65, also dealt at length with the Bank's detailed policy requirements for obtaining updated financial information on borrowers (where legally possible), which also dealt with the OCC's allegations of violation of Article XIII, i.e., purported " . . . failure to obtain current and satisfactory credit information on all loans lacking such information . . . ."

449:1). The Bank immediately responded with a special interim report from the Compliance Committee dated May 27, 1992 including the additions requested by the OCC. (TP 449:2-12; WS 4).

It is important to note that from January 1992 forward the Bank had ceased all lending activities in order to focus all of its efforts on compliance with the Consent Order. Consequently, the Bank (i.e., Mr. Granholm) had made the decision to defer further work on revising the loan policy (especially in light of the OCC's apparent acceptance of the revisions to that policy as of April of 1992) and focus his efforts on revising the Bank's appraisal methodology. Mr. Granholm had discussed this "prioritization" of his duties with both the Compliance Committee and the OCC. (TP 488:5-489:17). It was undisputed at trial that Mr. Granholm had made the OCC aware of this "prioritization" and that the OCC had approved it back in 1992. (TP 489:18-491:16; WS 11). Mr. Ragus admitted on cross-examination that he at least had to "partially agree" that this "prioritization" made sense in light of the fact that the Bank had ceased all lending activities. (TP 250:24-251:9).

Ironically, due to the successful collaboration between the Henning/Bolles minority faction and certain personnel of the OCC which forced Respondent to cease his active participation in management of the Bank after August of 1992, Mr. Granholm was required to assume the post of interim president, which took up even more of his time and made it impossible to focus on further revisions to the loan policy until December of 1992 when a new interim president was appointed. (TP 490:7-24). By the end of December,

Mr. Granholm had completed a draft of the loan policy revisions and submitted it to the temporary president (Pat Collins), a fact of which Mr. Ragus was aware. (TP 249:8-21). That revised policy prepared by Mr. Granholm in December of 1992 was submitted to and approved by the OCC in early 1993.

The foregoing evidence shows that the Bank had been working hard to satisfy OCC concerns regarding its loan policy well prior to the March 9, 1992 effective date of the Consent Order. Moreover, the Bank was certainly justified in relying upon the OCC's acknowledgements in February, March and April of 1992 that it was satisfied with the Bank's loan policies.

This belief was further substantiated by the fact that the Bank had ceased lending activities pending its complete compliance with all of the articles of the Consent Order. Because it had stopped lending, the Bank reasonably "prioritized" its tasks, opting to first revise its appraisal methodology policies, deferring further work on its loan policies until it was in a position to resume lending activities. The OCC conceded at trial that it had acquiesced in this "prioritization" in 1992. In accordance with this plan, as soon as Mr. Granholm was relieved of his duties as interim president, he drafted the finishing touches to his earlier work on loan policy and submitted it to the Bank's acting president in December of 1992. Soon thereafter, the OCC approved these final revisions in early 1993.

PROPOSED FINDINGS OF FACT

1. The decision by the Bank to defer completion of revisions to loan policies was disclosed to and approved by the OCC in 1992.

2. The OCC is estopped from declaring a violation of Article IX due to its own approval and acquiescence in the Bank's plan for compliance with Article IX.

3. The Bank was in material compliance with the requirements of Article IX.

4. Respondent did not cause, bring about, participate in, counsel, or aid and abet any noncompliance.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against respondent.

C. **ISSUE NO. 3: Did the Bank Materially Comply With Article X? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance.**

ARGUMENT

The OCC's position with respect to Article X was that the Bank did not have in place an effective "loan review program for the purpose of assuring the timely identification of problem loans in the Bank's loan portfolio." (See Exhibit B, Notice of Assessment of a Civil Money Penalty at p. 4 ¶ (6)).

At trial, the OCC attempted to support its position with the testimony of Mr. Ragus, who testified that he reviewed the Bank's loan portfolio and determined that there were ten loans that, in his opinion, should be graded lower than they had been graded by the

Bank. (TP 218:6-13). Mr. Ragus further noted that the Bank incurred $692,000 in loan losses in 1992. (TP 218:14-17). This loss resulted from two loans - the California Properties loan and the loan to borrower "F". (TP 218:18-219:2).

On cross-examination, Mr. Ragus was forced to admit that the Bank's loan review program had already identified both of these loans as "doubtful", which was the fourth lowest of five possible grades, the lowest being "loss". (TP 220:20-221:13).

Mr. Ragus also reluctantly admitted that these were the first two loans the Bank had ever taken a loss on in its entire seven year history and that he could not recall being in any other bank that had two or less loan losses in its history. (TP 221:14-222:8).

Mr. Ragus also reluctantly acknowledged that with the exception of the California Properties loan, all the other loans of the ten that he had downgraded had been paid off in full or were current and paying as agreed. (TP 225:5-226:4; TP 253:21-23). Mr. Ragus also candidly admitted that "every bank has some loan losses. It's part of the cost of doing the business." (TP 226:14-15). With respect to the California Hotel loan, Mr. Ragus was forced to admit that the 1989 San Francisco earthquake caused a significant drop off in the occupancy rate, and thus cash flow, of all hotels in the San Francisco area, thus reducing cash available for debt service. (TP 226:21-227:15).

In fact, Mr. Ragus' own report acknowledged that the California Properties loan and the loan to Borrower "F" were "unique to the portfolio." (TP 251:23-252:2; OCC 74, p. 4). In fact, Mr.

Ragus acknowledged that:

> "The loss potential from classified loans may be less than that experienced by other banks. All substandard loans are secured by real estate, mostly homes. The Bank has never taken a loss on a single family dwelling secured loan and several large substandard credits paid off, since our June 30, 1991 exam." (OCC Ex. 74, p. 4).

In the final analysis, Mr. Ragus was ultimately forced to admit that the fact that a loan criticized or downgraded by the OCC subsequently pays off is an indication that the OCC classification/downgrade may have been wrong in the first place. (TP 268:18-269:10).

Respondent took the OCC's June 1992 Report of Examination and prepared a report (WS 41) that showed that of the 22 loans criticized or downgraded by the OCC, 16 were paid in full and the remaining 6 were current, or about to pay off.

In sum, although the OCC contended that the Bank did not have in place ". . . an effective and independent loan review program for the purpose of assuring the timely identification of problem loans in the Bank's loan portfolio," the evidence at trial established that in fact the Bank's program for the identification of problem loans, and its ability to collect those loans when identified, resulted in an extraordinary track record of only two loan losses in its entire history. By Mr. Ragus' own admission, these two loans were "unique to the

loan portfolio" and he had never been in another Bank with two or less loan losses in its history. Given this extraordinary performance, it is difficult to conceive how or why the OCC can seriously contend that the Bank did not have in place adequate policies for the timely identification of problem loans.

PROPOSED FINDINGS OF FACT

1. At all relevant times the Bank had in place an adequate loan review program for the purpose of assuring the timely identification of problem loans in the Bank's loan portfolio. 2. The Bank was in material compliance with Article X.

3. Respondent did not cause, bring about, participate in, counsel, or aid and abet any noncompliance.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against Respondent.

D. ISSUE NO. 4: Did the Bank Materially Comply With Article XII? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance?

ARGUMENT

With respect to Article XII, the OCC contended at trial that "... as of December 31, 1992 the Board failed to establish a program for the maintenance of an adequate Allowance for Loan Lease Losses" (See Exhibit B, Notice of Assessment of a Civil Money Penalty, at p. 4, ¶ (7)). At trial the OCC was forced to backpedal in

the face of Respondent's substantial evidence that the Bank's allowances as of December 31, 1992 were in fact "adequate".[8] Recognizing that it could not prove the charging allegations in the Notice of Assessment, the OCC instead fell back on its familiar theme of subjective and semantic criticisms designed to obfuscate its lack of any objective proof. For example, on cross-examination Mr. Ragus admitted that "the Board had done all you [the OCC] had requested" with respect to the "allowance balance". (TP 263:3-7). Instead, Mr. Ragus complained only of the Bank's "methodology". (Ibid). He also candidly admitted that the Bank's "methodology" utilized appropriate "loss factors" as applied to its loan portfolio (TP 202:11-12), but complained that the Bank did not "explain why those factors are appropriate" for its loan portfolio. (TP 202:12- 14).

In response, Respondent again referred to the monthly reports given to the OCC commencing in April of 1992 (WS 1,2,3,4,5, and 6) which gave a detailed analysis of both the "methodology" for the Bank's allowance calculations, as well as a detailed substantiation of the "loss factors" which the Bank applied to the various categories of loans in its loan portfolio to determine what the allowances for losses

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[8] In fact, Respondent's evidence proved that in 1993, the OCC allowed the Bank to reduce its allowance $100,000. (TP 264:22-265:1). Since the Bank's 1993 allowance was at the same level as December 31, 1992, this evidence proved that, by the OCC's own admission, the Bank's December 31, 1992 allowance was not only "adequate" but was $100,000 higher than it needed to be.

should be (TP 455:17-465:3; WS 1). Respondent identified the new policy statement for allowance methodology (dated March 11, 1992, only two days after the effective date of the Consent Order) and described how that policy closely examined each aspect of the Bank's loan portfolio (TP 457:5-462:25).

As Respondent noted, the purpose of a reserve is to estimate future loan losses and make sure you have enough set aside to absorb those losses. (TP 458:4-7). Mr. Ragus gave similar testimony. (TP 197:23-24). Ironically, given the Bank's uniquely excellent track record of having never suffered any loan losses, the Bank had to utilize a methodology more complex than traditional analysis of historical loan losses. This methodology analyzed the various types of loans in the Bank's portfolio and the collateral for those loans. (TP 458:7-462:25).

In the final analysis, the OCC's entire case with respect to Article XII was nothing more than the simplistic conclusion that, since the OCC was of the opinion that the Bank's loan grading system was allegedly ineffective (see discussion of Article X above), and since the Bank suffered a $692,000 loss in 1992 on the California Hotel and Borrower "F" loans, the Bank's methodology for determining what its loan loss reserves should be must therefore be ineffective. (See OCC 134 wherein Mr. Ragus clearly premised his conclusion of allowance inadequacy on "the effect of our downgrades".) This argument of course fails since the underlying premises were themselves proven to be flawed. As noted above, the Bank's loan grading system had already graded the ten loans criticized

by the OCC as "doubtful", which was the fourth lowest out of five possible grades. Moreover, contrary to the OCC's conclusion that all of these loans should be graded as "losses", all of the loans paid off in full. The only exceptions, the California Hotel and Borrower "F" loans, were by the OCC's own admission "unique to the Bank's portfolio" and represented the only loan losses the Bank took in its entire history. It necessarily follows that since the $692,000 loss was a unique (in fact, the only) occurrence, the OCC's conclusion that the Bank's methodology for calculating loss reserves was somehow inadequate lacked any logical or substantive basis. Stated another way, since the OCC "downgrades" (see discussion of Article X above) were proven at trial to be unjustified, the OCC's resulting conclusion that the Bank's allowance was inadequate must logically also be unjustified.

Ironically, the Bank's "methodology" for calculating its allowance for losses had already caused it to voluntarily increase its reserves to $750,000 in early 1992 (TP 255:3-23), and an additional $200,000 near the end of 1992. (TP 262:15-263:2; OCC 134). The one time the OCC requested the Bank to increase its reserves, it was Respondent who stepped in and immediately caused a $250,000 addition to the reserve over the objections of the rest of the Board. (TP 257:4-10; WS 40).

As noted above, Mr. Ragus was forced to admit that the Bank had done all that the OCC requested of it regarding maintaining an adequate allowance balance in 1992. (TP 263:3-8). In fact, in 1993 the OCC allowed the Bank to reduce that balance by $100,000. (TP

264:22-265:1).

PROPOSED FINDINGS OF FACT

1. As of December 31, 1992 the Bank had established a program for the maintenance of an adequate Allowance For Loan and Lease Losses. As of December 31, 1992 the Bank maintained an adequate allowance.

2. The Bank was in material compliance with Article XII.

3. Respondent did not cause, bring about, participate in, counsel, or aid and abet any noncompliance.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against Respondent.

E. ISSUE NO. 5: Did the Bank Comply With Article XIII of the Consent Order? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance?

ARGUMENT

The OCC contends that the Bank violated Article XIII by allegedly failing "... to obtain current and satisfactory credit information" on various of the real estate secured loans in its loan portfolio. (See Exhibit B, Notice of Assessment of a Civil Money Penalty, at p. 5, ¶ (8); TP 265:2-7).

The OCC's case with respect to Article XIII completely fell

apart at trial. On direct, Mr. Ragus again gave his "opinion" that the Bank had not complied with Article XIII. Mr. Ragus identified several loans which his examination work papers indicated were lacking current financial information on the borrower.

At the beginning of the cross-examination with respect to Article XIII, Mr. Ragus was asked if he recalled being told by the Bank that, in California "... it was legally impossible for the Bank to go back and require current financial statements from the real estate borrowers because of their contractual relationships with those borrowers." (TP 265:8-14). He first denied such knowledge. (TP 265:15-16). He then recalled hearing something on that subject at Mr. Sarsfield's deposition a few weeks prior to the trial. (TP 265:17-19). He was then shown OCC 74, which was his February 10, 1993 "conclusion memo" prepared as part of the December 31, 1992 examination. In that memo, Mr. Ragus had included the following sentence:

> "The Bank cannot legally obtain updated financial information from most equity lines as long as the payments are current." (TP 266:5-14).

Mr. Ragus then denied any knowledge of the OCC being informed by the Bank of the legal impossibility in California of obtaining updated financial information on real estate loans that are current, as part of the negotiations leading to signing of the March 1992 Consent Order. (TP 266:19-267:2).

That afternoon Edward Mevi, counsel to the Bank's Board of Directors in 1992, took the stand. Mr. Mevi described the March 3, 1992 meeting with OCC representatives which led to the signing of the Consent Order, and his March 12, 1992 letter to the OCC confirming the substance of the agreements regarding the Consent Order made at that meeting. (WS 16). At the March 3rd meeting, the Board and Mr. Mevi advised the OCC that the Board may not be able to obtain current and satisfactory credit information on all loans lacking such information because it is legally impossible to do so under California law. (TP 367:22-368:12; WS 16). The OCC replied that they did not "expect literal compliance" with Article XIII and that a reasonable effort to obtain the information would be sufficient. (TP 368:16-19; WS 16). On cross-examination, the OCC lawyers asked Mr. Mevi if the Bank could have underwritten its real estate loans in such a way that they could have a legal means of obtaining updated credit information. The answer was and is "No". (TP 382:7-23).

The OCC never even attempted to refute the legal impossibility of the Bank's compliance with Article XIII. Moreover, the OCC never disputed its agreement with the Bank on March 3, 1992 that literal compliance with Article XIII would not be required - all that was expected was a reasonable attempt to obtain current financial information. This admission by the OCC conclusively establishes an estoppel to assess a civil money penalty for alleged noncompliance with Article XIII.

Nevertheless, Respondent took the stand and detailed the

Bank's extensive compliance with Article XIII. Respondent first detailed the Bank's revised policy provisions requiring detailed current financial information on all of the different types of loans comprising the Bank's loan portfolio. (TP 406-419; OCC 65). Respondent then identified the specific efforts undertaken by himself and the Bank to obtain current financial information on numerous specific loans that had been criticized by the OCC. (TP 465:4-469:5).

Finally, in addition to the established legal impossibility of obtaining current financial information, Respondent explained the practical reasons why in many instances it is not advisable to even attempt to do so. As Respondent explained, when a Bank's objective is to get paid on a loan, asking for updated financial statements is both counterproductive and exposes the Bank to the risk of litigation brought by borrowers arguing that the Bank misled them into believing their loans would be extended. (TP 418:16-419:9).[9]

In sum, the OCC's case on Article XIII was both substantively inadequate and barred by the legal doctrine of estoppel. The OCC acknowledged the legal impossibility of literal compliance with Article XIII and did not deny its agreement on March 3rd to waive such compliance. Moreover, Respondent conclusively proved that, to the extent legally possible, the Bank did everything possible to assure that its loan officers obtained adequate current financial

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[9] As part of Respondent's broad experience in banking spanning 35 years, he has testified extensively as an expert witness for banks and borrowers in lender liability cases.

information when making loans and updated that information whenever and wherever legally possible.

PROPOSED FINDINGS OF FACT

1. On March 3, 1992 the OCC waived literal compliance with Article XIII and agreed to accept a reasonable attempt by the Bank to obtain current financial information as adequate performance of Article XIII.

2. The OCC is estopped from declaring a violation of Article XIII due to its agreements with the Bank made on March 3, 1992.

3. The Bank was in material compliance with the requirements of Article XIII.

4. Respondent did not cause, bring about, participate in, counsel, or aid and abet any noncompliance with Article XIII.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against Respondent.

F. ISSUE NO. 6: Did the Bank Materially Comply With Article XV? If Not, Did Respondent Cause, Bring About, Participate In, Counsel or Aid and Abet Noncompliance?

ARGUMENT

Article XV required the Bank to maintain Tier 1 capital at least equal to eight percent (8%) of risk-weighted assets. At trial, it was proven that the Bank maintained Tier 1 capital at eight percent or

higher throughout 1992. However, in February of 1993, the OCC unilaterally decided to make an "adjustment" to the Bank's capital retroactive to December 31, 1992. As a result of that "adjustment" the OCC retroactively determined in 1993 that the Bank did not have Tier 1 capital at eight percent as of December 31, 1992. It was undisputed that the Bank maintained Tier 1 capital at eight percent or higher every other day in 1992. (TP 310:11-13; TP 469:22-471:5).[10]

The issue seized upon by the OCC in February of 1993 to retroactively "adjust" the Bank's Tier I capital calculation relates to a contract between the Bank and the federal agencies to service Freddie Mac/Fannie Mae loans. Under these contracts, the Bank services the Freddie Mac/Fannie Mae loans and receives certain income in exchange therefor (TP 305:17-308:11; WS 14). As with other Banks with similar contractual relationships, the value of these service contracts is carried as an asset of the Bank and goes into its Tier I capital calculation. (TP 308: 19-309:5).

The Bank had been valuing these contracts under accepted accounting methods for at least five or six years as of 1992. (TP 318:11-23; 328:15-22).

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[10]Xs noted above, both Mr. Sander and Mr. Ragus admitted that Mr. Sarsfield was not part of the Bank's management after August of 1992 and not responsible for compliance with the Consent Order thereafter. Nevertheless, the OCC saw fit to impose a $15,000 penalty against Respondent based upon its "adjustment" in February of 1993 of the Bank's December 31, 1992 assets.

In the early part of 1992, Respondent had discussed with the OCC the method by which the Bank valued these contracts. As a result of these discussions, Respondent consulted with the Bank's outside CPA firm and made an adjustment to the value at which these contracts were carried on its books. This adjustment was reflected in the Bank's financial statements thereafter and not questioned by the OCC throughout the rest of 1992. (TP 318:11-319-18).

On December 31, 1992, the Bank's Chief Financial Officer prepared a report given to members of the Board (including Respondent who had withdrawn from active management but was still on the Board) which showed the Bank's Tier I capital significantly higher than eight percent. (TP 310:14-24; WS 21). In February of 1993, and without any discussion or consultation with the Board of Directors, the OCC reversed the Bank's accounting treatment of the Freddie Mac/Fannie Mae servicing contracts and assigned a zero value. The OCC then made a retroactive adjustment to the Bank's Tier I capital causing that calculation as of December 31, 1992, to be at 7.82 percent (.18 basis points below the required eight percent level). (TP 309:6-310:10; TP 320:6-321:15; WS 22).[11]

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[11]It is interesting to note that this retroactive "adjustment" by the OCC is based upon a zero value being assigned to these Freddie Mac/Fannie Mae servicing contracts. At trial, the OCC offered no evidence to support this "adjustment" nor any explanation as to why the Bank's valuation of these contracts, based upon the advice of its outside CPA firm, was not the correct method.

In sum, it was undisputed at trial that the Bank had maintained Tier I capital at eight percent or higher throughout 1992, but for the OCC's unilateral (and unsupported) "adjustment" in February of 1993 made retroactive to December 31, 1992. Even if one assumes for the sake of argument that the OCC's assignment of zero value to these Freddie Mac/Fannie Mae service contracts is correct (in order to do so one has to ignore the conclusions of the Bank's CPA firm), it is still undisputed that as of December 31, 1992 the Board (and Respondent) reasonably relied upon reports given to it by the Chief Financial Officer indicating that the Bank's Tier I capital was in excess of eight percent on that date. Moreover, even if one were to assume for the sake of argument that the Board's reliance on information provided to it by its Chief Financial Officer was not reasonable, it is undisputed that Respondent was no longer involved in active management and responsible for the Bank's compliance efforts as of December 31, 1992.

PROPOSED FINDINGS OF FACT

1. The Bank was in material compliance with Article XV at all relevant times.

2. The Bank acted reasonably in relying upon the information supplied to it by its Chief Financial Officer that the Bank maintained Tier I capital at eight percent or higher as of December 31, 1992. The Bank could not have anticipated the OCC's February 1993 "adjustment" to the Chief Financial Officer's calculations.

3. Respondent did not cause, bring about, participate in, counsel, or aide and abet any non-compliance.

PROPOSED CONCLUSION OF LAW

The OCC did not carry its burden of proof to establish the requisite statutory factors necessary to support the assessment of any civil money penalty against Respondent.

III.

CONCLUSION

At the conclusion of the trial it was readily apparent that the OCC's case against Respondent lacked the requisite substance necessary to carry the OCC's burden of proof with respect to Articles VI, VII, IX, X, XII, XIII and XV. With respect to each indicia of alleged noncompliance, most of which were nothing more than purely semantic criticisms devoid of objective facts to support them, Respondent presented detailed factual evidence outlining his own extraordinary efforts at compliance with the Consent Order and the resulting compliance in fact with each of the articles placed in controversy by the Notice of Assessment. The few objective criteria relied upon by the OCC were shown to be erroneous, due to reliance upon a combination of outdated documents, erroneous and misleading reports from Henning/Bolles, and serious gaps in awareness of all that Respondent had done and was doing to comply with the Consent Order.

In addition, the evidence clearly established the OCC's prior acceptance of the Bank's compliance with Articles IX and XIII, thus estopping the OCC from belatedly claiming noncompliance in 1993. Moreover, Respondent presented an overwhelming body of evidence refuting the OCC's contention that Respondent "brought about,

participated in, counseled or aided and abetted" any alleged noncompliance. The OCC conceded at trial that Respondent was no longer involved in management after August, 1992 and was not involved with compliance with the Consent Order thereafter. Ironically, Respondent was forced to resign from management at the Bank in August of 1992 largely because of the admitted alliance between the OCC and the Henning/Bolles minority faction to force Respondent out of the Bank. The OCC admitted at trial that this was the acknowledged real purpose of the March 1992 Consent Order. In addition to a marked lack of substance, the OCC's case was also shown at trial to suffer from a serious lack of credibility. In its Prehearing Statement, the OCC admitted that its two star witnesses (Henning and Bolles) were members of a minority faction on the Bank's Board which intentionally attempted to thwart the Board's efforts at compliance with the Consent Order and instead pursued their own personal vendetta aimed at wresting control from the majority group on the Board. Mr. Henning admitted at trial that he "got in bed" with the OCC as far back as 1991 for that express purpose, and that he surreptitiously forged and submitted to the OCC false and misleading "reports" designed to mislead the OCC into ousting Respondent. In what can only be described as prosecutorial misconduct, the OCC first assessed Henning and Bolles a $5,000 penalty, and then bought their testimony with a reduction of that penalty to $950. The collusive nature of this conduct is illustrated by the fact that the OCC withheld final signature on this "deal" until after Henning and Bolles "performed" at trial.

Based on the foregoing, Respondent respectfully submits that the OCC failed to prove its case in support of the proposed $15,000 assessment against Respondent. The OCC is now precluded from arguing for an assessment in some lesser amount, having failed to prove the case that it took to trial. Respondent thus respectfully submits that the Court should find in his favor with respect to each of the Articles in the Notice of Assessment and find that no assessment against Respondent is warranted. In the alternative, if the Court does not conclude that a complete rejection of the OCC's case is justified, Respondent respectfully submits that any assessment should be for the nominal sum of $100 to reflect the admitted primary culpability of the Henning/Bolles minority faction for any alleged noncompliance with the Consent Order and the fact that, by the OCC's own admission, after August of 1992 Respondent was no longer involved in management or responsible for further compliance efforts.

Dated: August 11, 1994 Respectfully submitted,

/s/ Michael W. McCann
CAPPELLO & McCANN
Attorneys for Respondent

June 16, 1994

The Honorable Arthur L. Shipe
Office of Financial Institution Adjudication
1700 G Street NW
Washington, DC 20552

Re: In Matter of Sequoia National Bank, San Francisco, California, AA-EC-93-144.

Dear Judge Shipe:

I am writing to inform you that Respondents Glover, Niedermeyer, Henning and Bolles in the above-captioned action have entered into settlements with the OCC, which have been approved by the agency. Therefore, with respect to these Respondents, matter AA-EC-93-144 is considered closed. Copies of the executed settlement documents are enclosed.

Sincerely,
/s/ Michael Bloise
Attorney
Enforcement & Compliance Division
Enclosures

cc: All Counsel
Hearing Clerk

[Dated May 23, 1994 (pp. 1, 10-12 only)]

UNITED STATES OF AMERICA

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:

WILLIAM C. SARSFIELD, FORMER CHAIRMAN OF THE BOARD AND CURRENT DIRECTOR;

PETER P. BOLLES, FORMER DIRECTOR; AND

JOHN F. HENNING, JR., CURRENT DIRECTOR;

SEQUOIA NATIONAL BANK,

SAN FRANCISCO, CALIFORNIA

OFFICE OF THE COMPTROLLER OF THE CURRENCY'S PREHEARING STATEMENT

STATUTORY AUTHORITY

The Office of the Comptroller of the Currency ("OCC") is responsible for regulating the affairs of national banks and ensuring their safety and soundness for the protection of the depositors, shareholders, and the general public. Consequently, the OCC's statutory authority is extremely broad. First National Bank of La Marque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980). The OCC's statutory authority covers almost every aspect of the affairs of a national bank. See Independent Bankers Association

v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980). In fact, "[n]ational banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice." Id. at 1168. . . .

LEGAL ARGUMENT

ISSUE 1: Respondents caused, brought about, participated in, counseled, or aided or abetted the Bank's failure to comply with the terms of the Consent Order, in violation of 12 U.S.C. § 1818(I).

Respondents were all members of the Bank's Board of Directors, and as such possessed both the responsibility and the authority to ensure compliance with the Consent Order. The directors chose, however, to spend their time and energies bickering amongst themselves, to the detriment of the Bank. The Bank was first cited for noncompliance with the Consent Order in June of 1992. In spite of this warning, however, the directors continued to act at cross purposes, and allowed the Bank to remain in noncompliance through the December 31, 1992 examination.

Certain Respondents have claimed that they were unable to effect positive change because a majority of the Board actively prevented them from enacting any improvements. While this claim may seem reasonable, it evidences a fundamental lack of understanding of the proper role of a director. No single director

ever has the power to enact changes in the direction of a corporation solely by himself. Directors must act in concert, building consensus and exercising good faith in an attempt to create progress. In setting themselves up as a more or less "permanent" minority, those dissenting directors acted as a roadblock themselves, taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices, and to find truly qualified officer candidates to lead the Bank. Eventually, a president and senior lending officer acceptable to both factions was found, but by that time noncompliance with the Consent Order had continued for months, and the Bank had remained consistently in danger of failure.

The minority group of directors equated anything that was beneficial to the majority group with a detriment to the Bank. This simplistic mathematics ignores the reality that the primary duty of the minority group directors during the period of noncompliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the Board.[3]

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[3] See, Decision of the Comptroller of the Currency, In the Matter of Gateway National Bank of St. Louis, St. Louis, Missouri, AA-MW-88-95 (February 21, 1990). In Gateway, a director was held liable for noncompliance with a consent order, even though he had not signed the consent order, and was a dissenter on the board.

Because directors always have a duty to act in the best interests of the bank, once one accepts the premise that compliance with the Consent Order is in the best interests of the Bank, the entire Board of directors may be cited for its failure to bring about compliance. This case differs from an ordinary situation where there may be legitimate internal differences among the directorate as to what constitutes the best interests of the Bank. That issue does not arise here, because the terms of the Consent Order, approved by the Board of Directors and the OCC, constitute a de facto list of what those interests are. All that the directors then had to do, all that they had to agree on, was to take the steps necessary to ensure compliance with the Order. The entire directorate failed to take those steps, and therefore the entire directorate is liable for the failure to do so. . . .

DATE: 5/23/94 Respectfully submitted,

/s/ Michael Bloise, Attorney
Enforcement & Compliance
Division Office of the Comptroller
of the Currency
Washington, DC 20219
(202) 874-4800

[June 10, 1994 (Vol. IV, pp. 784-789,
796-799, 802-807, only)]

BEFORE THE
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:
WILLIAM C. SARSFIELD, Former Chairman of the Board and
Current Director;
SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Transcript of Proceedings

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knew about the issue. I was not party to the discussions with the OCC, however.

MR. BLOISE: Mr. Henning, I'd like to ask you to take a look at the documents marked OCC Exhibits 156 to 160.

(The documents referred to were marked OCC Exhibits Nos. 156 through 160 for identification.) (The documents were proffered to the Witness.)

THE WITNESS: Yes. Well, I'm looking at them, yes.

BY MR. BLOISE:

Q. Are you familiar with these documents?

A. Well, since I was authoring them, I think I am. Yes.

Q. Taking them one at a time, could you go through them and explain what they are?

A. Well, I'll go through them in the numerical order in which they've been presented to me. I'm dealing first with OCC Exhibit 156, which is my letter to Joanne Hyder, dated March 25, 1993. This was a bitter letter of mine to Ms. Hyder. It is venting my frustrations in terms of being on the Compliance Committee, and the fact that I was being

undercut to my way of thinking. It appears -- I don't mean to create problems here, but the whole letter is not here.

Q. This is the version that comes out of the OCC --

A. It stops -- what?

Q. This is the version that I found --

A. Well, there's a very truly yours. Well --

MR. BLOISE: Your Honor, do you have beyond page 9 of Exhibit 156?

JUDGE SHIPE: No, I do not.

THE WITNESS: Well, I --

MR. BLOISE: All the copies are short.

THE WITNESS: Well, I could procure it at the break, or something, but this letter was longer than the exhibit I have here. But without going through this line by line, it's a summary of my problems with the Bank and with my frustrations and inabilities to meet the requirements for compliance with the Consent Order, and the general problems with the Bank's operation. Short of going through each line, I have difficulty going beyond that.

BY MR. BLOISE:

Q. Moving on to Exhibit 157, would you explain what that is.

A. Let's see what the date of this is. This is a

(1) declaration in October of '91, which I believe was in (2) response to one of these 15-day notices. Again, it (3) outlines in historical detail my problems with the Bank, (4) getting back to June, roughly, of '91, and the attempts by (5) Mr. Sarsfield to handcuff and limit my powers and exercise (6) of my rights as a director, and in his general (7) interferences with the operation of the Bank. I'm (8) generalizing that in response to your direction.

(9) Q. Is there specific incidents discussed in that (10) declaration? (11) A. There are a number of specific incidents. I was (12) somewhat disturbed regarding retaliatory treatment of our (13) Ms. Beverly Williams, who was our vice president and (14) cashier. She brought to my attention that there were a (15) number of violations of the reporting functions and the (16) Call Reports. There were attempts to intimidate her in (17) terms of her contacts with the OCC. There were elements (18) of what I thought were sexual discrimination involved at (19) the Bank in terms of employment. The problems of removing (20) Ms. Williams from employment were something I resisted. (21) There was an attempt to force my resignation. (22) There was an attempt to bribe me, as I interpreted it. (23)There was also an attempt, there was an ongoing attempt by (24) Mr. Sarsfield to determine which employees of the

Bank (25) were talking to the OCC. He asked me this question a

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(1) number of times. He asked this question of Mr. Sander and (2) told Mr. Sander, when Mr. Sander was at the Bank, that he (3) was quite aware that the OCC was talking with myself and (4) with Ms. Beverly Williams, and he wanted Mr. Sander to (5) realize that. These were all attempts in my view to (6) intimidate the OCC. There were constant attempts to (7) intimidate the OCC.

(8) I will try to be calm here. But at the very (9) final meeting that we had with the OCC, at which we signed (10) the -- which I refused to sign, I might add -- the Consent (11) Order, at the close of the meeting, the Bank's attorney, (12) Mr. Mevi, stood up -- and there are memos to this effect (13) signed by Mr. Tornborg and Mr. Sander -- at the close of (14) the meeting, he stood up and told the OCC representatives (15) that, if any director, any employee of the Bank, contacted (16) the OCC with regard to this Consent Order, or any other (17) matter, the employee would be fired and they would remove (18) the director. And the OCC representatives sat there and (19) looked at the table.

(20) Q. Continuing on, Exhibit 158, can you identify (21) that document?

(22) A. This was involving a memorandum, which I (23) prepared for Jane Bodmer. I believe I attended a meeting

(24) with Stan Crisp, Jane Bodmer and Robert Tornborg at the (25) OCC. This laid out, in the time frame of June and July

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(1) 1991, my problems with the Bank's administration. I would (2) note there that the question of liquidity had its ugly (3) head raised even back then. Again, while the memo, you (4) know, speaks for itself, it does reflect the total (5) domination of the Bank's administration by Mr. Sarsfield, (6) which domination continues to date. It also, if you look (7) at page 7, 8, 9, it's statements attributed to Mr. (8) Sarsfield there, all reflective of his general attitude (9) and approach to the Bank, and the problems there are (10) problems that plagued the Bank at that time and many (11) continue to plague the Bank.

(12) Q. Can you identify Exhibit No. 159? (13) A. Exhibit 159 is a July 1 memorandum, again (14) prepared for Ms. Bodmer. I might explain this for the (15) Judge so he understands this format here. This format was (16) designed to make this appear to be an official document. (17) I just want to explain this for the Judge's education. (18) At the time I first met with the OCC, it my (19) understanding that associated of Mr. Glover and Mr. (20) Sarsfield were still employed with the OCC, and I was (21) quite concerned that any comments of any materials that I (22) provided the OCC would be attributed to me

immediately by (23) personnel of the OCC. That was, I want to say for the (24) record, that was an unfounded fear. I don't mean to (25) suggest otherwise; but, at the time, in June and July

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(1) 1991, we had been told for four or five years that Kent (2) Glover had been the head man at the OCC. These people (3) worked for him. He hired them, he controlled them. They (4) had people in the OCC that would take care of us. So, to (5) some degree, I believed that and, as I told Ms. Bodmer, (6) when I first met her, the purpose of preparing these memos (7) in this form was to essentially prevent any attribution to (8) me in case personnel of the OCC came upon these. I didn't (9) want these things getting back to Mr. Sarsfield. So (10) that's why they were put in this format. I just wanted to (11) explain that. These documents were prepared by me and (12) this format was chosen by me to disguise the source. I (13) just didn't want the Judge to think that this was a formal (14) document prepared by the OCC. It was prepared by me.

(15) But, again, this lays out the problems in terms (16) of capitalization, the questions of Board dissension, the (17) problems of Mr. Sarsfield's outside legal consultations (18) for various law firms, the problem that I thought the (19) Bank's charter had been procured by fraud; namely: there (20) was no 914 review done on any

of the officers. It was (21) represented to the OCC that Mr. Glover would be the chief (22) executive officer when, in fact, it was at all times Mr. (23) Sarsfield. This charter was procured by friendship and by (24) letter, literally. I won't dwell on that any longer, but (25) the point is that the problems with this bank, in terms of .

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(1) JUDGE SHIPE: Are you a shareholder in the Bank?

(2) THE WITNESS: Yes, I am.

(3) JUDGE SHIPE: How many shares do you have?

(4) THE WITNESS: I have 6,900, roughly, shares.

(5) JUDGE SHIPE: How many shares does Sarsfield (6) hold?

(7) THE WITNESS: I don't know. I just know in (8) matters of the dollars. I think he has an investment of (9) something close to $350,000 to $400,000. My investment (10) is roughly $50,000.

(11) JUDGE SHIPE: Thank you.

(12) Are you going to have extended cross?

(13) MR. MC CANN: I wouldn't call it extended, Your (14) Honor. I think probably certainly less than an hour.

(15) JUDGE SHIPE: We'll take a short recess.

(16) Off the record.

(17) (Whereupon, a brief recess was taken.)

JUDGE SHIPE: We'll be back on the record.

Mr. McCann, you may cross-examine.

MR. MC CANN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MC CANN:

Q. Now, Mr. Henning --

A. Yes.

Q. -- you, as you testified, you've been a member

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of the Board of Directors at this Bank, since back at its inception. Is that correct?

A. That is correct.

Q. And I believe you had identified yourself as a member of what we call the minority faction on the Board here. Correct?

A. That's true, yes.

Q. In fact, you're probably sort of the ringleader, wouldn't you say, of the minority faction?

A. Well, there's no ring left. I'm the only member of the minority left. I'm sorry.

Q. But you were the driving force in the minority faction. Right?

A. Well, yes. If you want to say that, yes.

Q. And you've really been on sort of a personal vendetta trying to get rid of Mr. Sarsfield out of this Bank for some years, now, haven't you?

(18) A. Since June of '91, yes; that's absolutely (19) correct.

(20) Q. And you found out in August of 1992, in a (21) meeting with the OCC that that was their objective, as (22) well. That was the purpose behind the Consent Order, (23) right?

(24) A. No.

(25) Q. Let me --

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(1) A. I was advised of that at a meeting, but I wasn't (2) present at the meeting.

(3) Q. Well, that's right. Your Mr. Bolles told you.

(4) A. Yes.

(5) Q. Is that right?

(6) A. Yes.

(7) Q. And Mr. Bolles, as a matter of fact, is one of (8) the directors who you represented in these proceedings. (9) Right?

(10) A. Yes, that's true. Yes.

(11) Q. And you have no reason to believe that what Mr. (12) Bolles told you about the OCC's real purpose for the (13) Consent Order to be untrue, do you?

(14) A. No.

(15) Q. And so, when you found out that you and the OCC (16) had similar objectives, you decided to get in bed with the (17) OCC. Didn't you?

(18) A. I decided to get in bed, if you want to use that (19) phrase, back in 1991.

(20) Q. Okay.

(21) A. For two years.

(22) Q. And you found out you finally had a willing bed (23) partner in August of 1992. Right?

(24) A. No. I knew that on June 26, 1991.

(25) Q. Okay. Now, you were named as one of the

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(1) Respondents in these proceedings, weren't you?

(2) A. Yes. That's correct.

(3) Q. Okay. And by the way, and you made a deal with (4) the OCC now, before you testified here. Right?

(5) MR. BLOISE: Objection, Your Honor. Settlement (6) is inadmissible in these proceedings.

(7) MR. MC CANN: Well, it's highly admissible to go (8) to bias and motive for the testimony and opinions --

(9) JUDGE SHIPE: I deny the objection. The witness (10) may answer.

(11) BY MR. MC CANN:

(12) Q. Let me rephrase it. You made a deal with the (13) OCC before you testified here today, didn't you?

(14) A. No.

(15) Q. Well, we'll come back to that.

(16) Now, did you get -- (17) A. Let me answer the question. (18) Q. There's no question, Mr. Henning.

(19) A. What?

(20) Q. You don't have a question to answer. All right?

(21) The rules are a little different when I'm asking them.

(22) A. They are? You make the rules?

(23) JUDGE SHIPE: Let's just have the question.

(24) //

(25) //

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(1) to attempt to thwart any initiative which might (2) have the secondary effect of allowing the (3) majority group to retain effective control of (4) the Board."

(5) Were you aware of this?

(6) A. I was not aware of any of those statements.

(7) Q. Okay.

(8) A. But I'll agree absolutely with the last (9) statement. Absolutely.

(10) Q. So, in other words anything the majority group

(11) OF the Board suggested --

(12) A. Yes.

(13) Q. -- in terms of their efforts to comply with the (14) Consent Order --

(15) A. Yes. (16) Q. -- if it also had the effect in your opinion of (17) them remaining as the majority group you opposed it. (18) Didn't you? (19) A. Absolutely not. Absolutely not.

Q. Are you telling me that the OCC is wrong, then?
A. I'm just stating, answering your question. You can draw your own conclusions.
Q. Thank you.
A. Good.
Q. Now, after having made those statements about

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you --
A. Well, this statement, for the record, I would --
Q. And, by the way, when you negotiated your settlement agreement with the OCC, you also negotiated on behalf of your client, Mr. Bolles. Is that correct?
A. That's correct.
Q. Now, you had the Notice of Assessment that indicated that the OCC, at least, thought you should be assessed $5,000. Right?
A. No. I thought it was $4,000, but I could be wrong.
Q. And you got them to take only $990. Right?
A. I don't know. There's a question of "got them." Let's state it this way: That was the sum agreed upon, yes.
Q. That was the dollar amount that they agreed to reduce the penalty so you would cooperate with them here in these proceedings. Right?

(19) A. No, that's not correct. No. That's not (20) correct.

(21) Q. By the way, how did you get the figure $990? (22) You wanted it to be under a thousand dollars, didn't you, (23) Mr. Henning?

(24) A. Well, I did not agree to pay any penalty.

(25) Q. But you agreed to pay $990 --

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(1) A. No -- (2) Q. -- in this deal that you made with them. Right? (3) A. There is no deal as yet. There's a negotiated (4) settlement that hasn't been executed.

(5) Q. Okay. But you wanted it under a thousand (6) dollars. Don't you?

(7) A. I wanted zero dollars.

(8) Q. But you told them it had to be under a thousand, (9) didn't you?

(10) A. Well, I made a number of statements. At one (11) time, I said I didn't want more than $250, $450. It went (12) back and forth. Then, I did say that I wasn't going to (13) pay that kind of money; and, then, the figure of $990 came (14) up, yes.

(15) Q. Well, actually, you were down around $250 or (16) $450. They were much higher than a thousand. You told (17) them it had to be under a thousand. Didn't you?

(18) A. I don't recall them -- now, they're tact -- I (19) don't know whether this is relevant or not -- was to make

(20) me come up from the basement. I don't think, I don't (21) recall them ever having a figure above a thousand. I was (22) being pulled up and it wasn't as if they were opposing. (23) They weren't coming from $500 down. I was coming from --

(24) Q. Try to answer my question, please, Mr. Henning.

(25) You told the OCC that, whatever the agreement was going to

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(1) be, it had to under a thousand. Didn't you?

(2) A. That became a point at the end, yes.

(3) Q. That's a yes, isn't it?

(4) A. Yes.

(5) Q. That's your way of saying yes?

(6) A. Yes.

(7) Q. And you wanted it under a thousand and the OCC (8) went along with you --

(9) A. No, they haven't, yet.

(10) Q. -- because you felt that, if you paid over a (11) thousand, it may have some impact on your aspirations to (12) be appointed to the bench. Isn't that correct, Mr. (13) Henning?

(14) A. No. (15) Q. Well, why did you have to have it under a (16) thousand?

(17) A. Because I thought it, to be frank, made the (18) Board, or the OCC, look ludicrous.

(19) Q. Okay.

(20) A. Sorry about that.

(21) Q. But they, at any rate, went along with your --

(22) A. They haven't as yet.

(23) Q. -- view, though.

(24) A. It's my prayer that they go along with it, so I (25) support that.

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(1) Q. And being a good lawyer, you cut the same deal (2) for your client, Mr. Bolles. Correct?

(3) A. Yes.

(4) Q. And he's going to be testifying here today, too, (5) isn't he?

(6) A. I assume he is.

(7) Q. Well, you've seen him out in the hallway. You (8) know he is. Don't you?

(9) A. Yes, I do. (10) Q. You don't have to assume that. That's a fact (11) you know. Isn't it?

(12) A. He's been here for 3 days and still hasn't (13) testified, so it's not a fact.

(14) Q. Now, you also, in addition to trying to get rid (15) of Mr. Sarsfield for many years, and now collaborating (16) with the OCC in that effort, you've been trying to get the (17) OCC to close the Bank for many years. Haven't you?

(18) A. Yes.

(19) Q. Okay.

(20) A. Well, since July of '91, yes.

(21) Q. Now, by the way, you testified for the OCC on (22) this subject of the plan to sell assets. Now, did I (23) understand you correctly? Is it your testimony that Mr. (24) Sarsfield resisted the plan to sell the assets?

(25) A. I stated -- yes. He took no action to support

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(1) the resolution of the Board to sell the assets.

(2) Q. Mr. Henning, isn't it true that Mr. Sarsfield (3) prepared the action plan and presented it to the Board in (4) August to get it adopted for the every objective of (5) selling the assets?

(6) A. August, September, October, November, December, (7) five months. December 31, 1992, didn't meet liquidity. (8) So he delayed that for five months.

(9) Q. Excuse me, Mr. Henning. (10) A. Yes.

(11) Q. Answer my question, would you, please.

(12) A. The answer to your question was answered in my (13) direct testimony. The Board --

(14) Q. Answer my question, please.

(15) A. -- in August adopted the plan to liquidate --

(16) Q. And who wrote it?

(17) A. He proposed it back --

(18) Q. Thank you.

(19) A. -- in March, in fact, and waited four months (20)

before ever acting on that.

Q. But you also told us a few minutes ago, for the OCC, that it was your idea to sell the assets. Didn't you?

A. That was my idea, yes.

Q. Did you prepare the action plan in August and . . .

[June 10, 1994 (Vol. IV, pp. 831-832 only)]

BEFORE THE
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:
WILLIAM C. SARSFIELD, Former Chairman of the Board and
Current Director;
SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Transcript of Proceedings

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BY MR. MC CANN:

Q. Exhibit 141, please, Mr. Bolles.

Actually, before we get into that, back in August 1992, when Mr. Sarsfield withdrew from the day-to-day management of the Bank, do you recall he submitted a proposed action plan to the Board which was, in fact, adopted by the Board?

A. Yes, I do.

Q. And, in fact, you would agree that that plan, if adequately implemented by management after its adoption by the Board, would have responded to all the issues in the Consent Order. Right?

A. No. No, it only responded to certain specific articles.

Q. Well, let me read to you -- let me ask you this: Do you recall giving a deposition for the OCC in this case back in April of this year?

A. Correct.

Q. Let me read to you, please, from page 35, line 24, over onto page 36: "Answer: But basically, by August, there was in effect a Board mandated plan to resolve and to address each one of these issues that you're talking about: capital, assets, management, earnings and liability."

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(1) A. That's correct.

(2) Q. Do you recall giving that answer?

(3) A. That does not necessarily respond to all 17 (4) articles of the Consent Order. It does, that does, (5) respond to the items that were raised at the deposition (6) which had to do with a separate matter.

(7) Q. Well, you do understand that all 17 articles are (8) not in contention here in this hearing here, either?

(9) A. I don't understand that, no.

(10) Q. So you don't know what's in contention and (11) what's not in contention?

(12) A. No, I don't.

(13) Q. Okay. But you at least admit that, at your (14) deposition, you told the OCC that Mr. Sarsfield's plan (15) responded to all the issues they were raising. Right?

(16) A. At the deposition.

(17) Q. And if implemented, it would have responded to (18) all the issues, at least the ones raised by the OCC, at (19) your deposition. Right?

(20) A. Those issues raised at the deposition, yes.

(21) Q. And, then, in Exhibit 141, on page 10, please, (22) I'd like to direct your attention to the same statement (23) that the OCC brought to your attention; that is:

(24) "The Board is now unified behind Director (25) Sarsfield. . . . ."

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

243a

APPENDICES VOLUME III OF III

(243a-362a)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

WILLIAM C. SARSFIELD

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

No. AA-EC-93-144

WILLIAM C. SARSFIELD

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

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120 pp

[June 8, 1994 (Vol. II, p. 290-293, and 296 only)]

BEFORE THE
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director;

SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Transcript of Proceedings

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(1) (The document referred to, (2) Respondent's Exhibit No. 9, (3) having been marked for (4) identification, was received (5) in evidence.)

(6) BY MR. MC CANN:

(7) Q. By the way, Mr. Sarsfield, did your role and (8) position in the Bank change in August 1992?

(9) A. Yes, it did. August 24, 1992, by Board (10) resolution, my position as an executive officer ceased, (11) and I went to -- and the by laws were changed. I went to (12) a nonexecutive officer status, continuing to keep the (13) title as chairman. Then, I had -- I continued on in a (14) consulting capacity until -- on a month-by-month basis, (15) but with that activity declining each month. I did, by(16) the way, because Mr. Granholm was appointed as acting (17) president, subject to the OCC's approval, and because of a (18) time sequence he could not take the job until the end of (19) the first week in September, I stayed on in kind of a (20) senior officer present -- to use an old military term -- (21) until the first week in September, then Mr. Granholm took (22) over. Thereafter, I was in the capacity, in addition to (23) being a director, as a consultant on a reduced basis.

(24) Q. Did you -- were you in favor of this change?

(25) A. To tell you that I was enthusiastic about it

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would be not true, but I felt it had to be done. The Board was not unified, and I felt that I had to step aside. I just couldn't keep -- that I didn't have the leadership, for whatever reason, to pull everybody together, that I was becoming a matter of contention. The best thing to do was to step aside and let other people step up. I did not do that with great enthusiasm, but I thought it was the proper thing to do, or the only thing that made good sense at the time.

Q. And following that change in your role in the Bank, were you involved in the day-to-day management of the Bank any longer?

A. No, I was not. I did continue on as a consultant. We had some litigation going that I spent some time on. I also spent some time trying to help Mr. Granholm on the collection of loans, where I was intimately -- or I had detailed knowledge of the state or the status of the loan borrower. I did my very best to preserve our deposit base. I knew almost all of our large customers, and I did my best to keep those deposit account, and I was available, if called upon.

Q. All right.

A. I moved my office out of the Bank, by the way.

MR. MC CANN: We'll mark next, for identification, Sarsfield Exhibit 37. It's near the back

(1) of the box that we have for the Court. (2) (The document referred to was (3) marked Respondent's Exhibit (4) No. 37 for identification.)

(5) BY MR. MC CANN:

(6) Q. I'll ask you if you recognize that document, Mr. (7) Sarsfield?

(8) (The document was proffered to the Witness.)

(9) A. Yes. (10) MR. MC CANN: Does the Court have his copy of (11) that yet?

(12) THE WITNESS: This was a document that I (13) prepared. I had met a few days prior to the preparation (14) of this document with the members of the Compliance (15) Committee, Mr. Bray, Mr. Puccinelli, Mr. Bolles, and also (16) with Victor Granholm. We discussed the need to make some (17) changes. So, I took the bull by the horn in following the (18) OCC's format of the CAMEL, capital, assets, management, (19) earnings and liquidity, and prepared a proposed action (20) plan that I submitted initially to the Compliance (21) Committee; and, then, in turn, it was submitted on August (22) 24, to the Board of Directors.

(23) BY MR. MC CANN:

(24) Q. What was your purpose for preparing that action (25) plan and presenting it to the committees as you just

described? A. My role was changing at this time, and I wanted to lay out what I thought was a plan that would accomplish the Consent Order and could be followed by interim management, and that was a document that would explain what was happening and explain the change of management. It was a document that I hoped would pull everybody together and, in turn, set some clear-cut goals that we could all accomplish, that we could all agree on; and take steps to accomplish.

Q. Was that plan adopted by the Board?

A. Yes, sir, it was.

Q. And what was your understanding as to who was then primarily responsible for following the plan after its adoption by the Board?

A. Well, it was -- everybody was to be responsible for it. The Compliance Committee took on the job of trying to get this thing done, in making sure it was done on a day-by-day basis. The acting CEO would be the one, the key one, to implement and carry this thing out.

Q. And who was the acting CEO at that time?

A. Mr. Granholm.

MR. MC CANN: Next, for identification, Sarsfield Exhibit 17, an August 25, 1992 letter.

(25) //

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(1) the Board, I'm quoting from it: ". . . I will have no (2) management responsibilities." And I've offered my (3) services as a consultant to the Bank at and hourly rate of (4) $75. This, incidentally, was declining in total number of (5) hours each month.

(6) Q. By the way, speaking of hours and compensation, (7) starting in March 1992, when the Consent Order was signed, (8) did you make any adjustments to your compensation?

(9) A. Yes, sir. I had been paid $74,000 a year to (10) serve as an executive officer. When we signed the Consent (11) Order at the March Board Meeting, I voluntarily reduced my (12) salary $14,000, from $74,000 down to $60,000. I'd also (13) had had an arrangement with the Bank that it was not (14) required that I spend all of my time there. I'd kept my (15) consulting practice going. What I did during this period (16) of time, I substantially increased my hours -- this is (17) noted, in fact, in some of the examination reports -- to (18) approximately 60 hours a week. Also, I took steps to (19) eliminate some other expenses and eliminated the auto (20) allowance that all of the officers were receiving. That (21) was a net reduction of about 20-some thousand dollars in (22) additional benefits -- not just received by

me, but by (23) others. So, I increased my hours and decreased my pay.

(24) MR. MC CANN: Next, for identification, as (25) Sarsfield Exhibit No. 6, September 9, 1992 Progress . . . .

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(1) A. My math, if my recollection is correct, I was in (2) the intensive care ward, or in the hospital, at Barton (3) Memorial Hospital up in Lake Tahoe. I had been following (4) Mr. Granholm coming in. Labor Day, we went up to Lake (5) Tahoe, as we did every year; and, up on Angora Peak, my (6) stomach ruptured, or my ulcers, that I had been suffering (7) from for about a year and a half. Lost half my blood and (8) my wife got very mad at me. She thought I was dead. I (9) was in the hospital so I didn't have much of a role in (10) working any of this at all.

[June 7, 1994 (Vol. 1, pp. 103-105, 152, only)]

BEFORE THE
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:
WILLIAM C. SARSFIELD, Former Chairman of the Board and
Current Director;
SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Transcript of Proceedings

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[A.:] . . . National Bank Examiner.

Q. When did -- were you supervised by anyone when you did the June 1992 examination for Sequoia National Bank? You were the examiner-in-charge on that?

A. I was the examiner-in-charge. That is correct.

Q. Were you supervised by someone?

A. My field manager supervised me.

Q. Did your field manager supervise on the other approximately 15 examinations in which you had previously been an examiner-in-charge?

A. I've always been assigned to a field manager. I've had several field managers over the period of time.

Q. Mr. Sander, I'm going to ask you to turn to OCC Exhibit 63, if you would, and I'll try to find mine.

A. (Witness complied.)

Q. Do you have OCC Exhibit 63, Mr. Sander?

A. Yes, I do.

Q. Now, I believe you testified that you used this document as part of your December 31, 1992 examination. Is that correct?

A. Yes, we did.

Q. And how did you use it?

A. We looked at this document and we compared the Bank's compliance with this document.

Q. So you took Exhibit 63 and then took your -- the

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information and data you had gathered as part of the December 1992 examination to compare whether that data reflected compliance with Exhibit 63. Is that correct?

A. Yes. Q. And how did you determine to use Exhibit 63 for that comparison?

A. Because this was a document that was provided to us.

Q. By whom?

A. By the Bank.

Q. What individual at the Bank?

A. We sent out a request letter to the Bank.

Q. Do you know which individual gave you this document?

A. I do not recall the specific individual.

Q. It wasn't Mr. Sarsfield, was it?

A. As I say, I don't recall the name of the specific individual.

Q. But you can recall that Mr. Sarsfield was not, in December 1992, involved with the Compliance Committee or compliance with the Consent Order, right?

A. Yes. Q. And do you recall that, even though you can't recall the specific individual, are you able to agree that it was not Mr. Sarsfield?

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A. Yes.

Q. Now, so you performed this comparison of the data and information you had as a result of the examination. You compared it to Exhibit 63 and concluded that the Bank was not in compliance with the policies as reflected in Exhibit 63. Is that correct?

A. That is correct.

Q. Now, do you know when Exhibit 63 was prepared?

A. I don't recall.

Q. Let me ask you to look at the second page, upper left-hand corner, it says, "Section 1.01," and then is says, "Date." Do you see that?

A. Yes. Q. That's December of 1986, correct?

A. Correct.

Q. And, if you look through the rest of the document, you will see consistently that same date of December 1986 appears?

A. (After a pause.) Except for the last four pages.

Q. Okay. Are you referring to the --

A. The exhibit.

Q. -- the exhibit. So you can't tell when that was prepared by looking at it, can you?

A. No.

Q. But it does say that -- there's blanks where it . . . .

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Q. Okay. And, when you got the report, did you communicate to Mr. Sarsfield what you're telling me here now about what was missing?

A. As I recall, we communicated to the Bank observations on the Article VII.

Q. Well, let's stay with Article VI.

A. I mean Article VI, I'm sorry. As I recall, we communicated to them in April, I do believe, on liquidity issues and volatile liabilities.

Q. Well, my question is: You've told me here this afternoon that you did get a plan, or some information. It addressed issue (2)(a) and issue (2)(b), which are the only ones we've covered so far; but that you felt there was some additional analysis lacking beyond the information provided. Is that roughly accurate? A. The analysis was lacking.

Q. And did you tell Mr. Sarsfield what analysis was lacking that you wanted to see?

A. I don't specifically recall us mentioning that.

Q. Let me ask you this: Did you ever ask Mr. Sarsfield for any information that he failed to give you?

A. I'm not aware of any.

Q. Did you ever ask him to do anything that he refused to do?

A. I can't think of an example, no. . . .

(ER 42)

[June 9, 1994 (Vol. III, pp. 734-735, only)]

BEFORE THE

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER

OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:

WILLIAM C. SARSFIELD, Former Chairman of the Board and

Current Director;

SEQUOIA NATIONAL BANK,

SAN FRANCISCO, CALIFORNIA:

Transcript of Proceedings

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(1) [Q] . . . is the, what we called, I think, the Sarsfield Action (2) Plan. I think you might have heard Mr. Sarsfield testify (3) about that in the last couple of days.

(4) A. Yes.

(5) Q. And do you recall Mr. Sarsfield testifying that, (6) in fact, this was a plan he put together and gave to the (7) Board of Directors as his sort of final act, as he retired (8) from active management of the Board. Right?

(9) A. Yes.

(10) Q. And I believe you just acknowledged in response (11) to Mr. Bloise's questions that one could characterize this (12) as a plan to deal with, for instance, the liquidity (13) management of the Bank. Right?

(14) A. Yes.

(15) Q. The problem you have, which is the same one Mr. (16) Sarsfield has, is that the management of the Bank, (17) after he left management, didn't fully implement this (18) plan, did they?

(19) A. No.

(20) Q. That's not Mr. Sarsfield's fault, is it?

(21) A. I don't know if I can answer that because I hold (22) the Board accountable for the condition of the Bank.

(23) Q. But you were aware that Mr. Sarsfield was no (24) longer involved in management -- right? -- after August.

(25) A. That is correct.

(ER 42)

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Q. He wasn't on the Compliance Committee. Right?

A. That is correct.

Q. And are you aware that Mr. Sarsfield attended the meeting of the Board in August at which the Board adopted this plan?

A. I don't specifically recall.

Q. Well, you recall Mr. Sarsfield at least testifying to that while you were here in court?

A. Yes. Q. So, Mr. Sarsfield, knowing he was going to leave management, put together a plan before he left management and made sure the Board adopted that plan . Right?

A. Yes.

Q. And if he's no longer involved in management at the Bank, if he's not on the Compliance Committee, wouldn't you agree that the failure -- if there was any -- to implement any portion of this plan was the responsibility of the ongoing management of the Bank, not Mr. Sarsfield, and of the Compliance Committee, not Mr. Sarsfield?

A. No. I do not agree with that.

Q. I guess that's why we're here.

A. Yes.

Q. Because this plan would have accomplished complete literal compliance with the Consent Order if the...

[June 7, 1994 (Vol. 1, p. 233 only)]

BEFORE THE
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:
WILLIAM C. SARSFIELD, Former Chairman of the Board and
Current Director;
SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Transcript of Proceedings

Page 233

A. Who was the temporary president.

Q. And the temporary president before her was Mr. Granholm? A. I think so.

Q. At any rate, you weren't dealing with Mr. Sarsfield in this area in the period September, October, November, December, and into January 1993. Correct?

A. That's correct.

Q. And did you have an understanding, during the period September 1992 through December 1992, who in the Bank had the responsibility for compliance with Article X?

A. No, I don't. I don't know -- I do not know who was responsible for compliance with Article X.

Q. But, at any rate, you certainly weren't dealing with Mr. Sarsfield with respect to the Bank's compliance with Article X, were you?

A. Well, I can't answer that given your time frame;

but I can tell you that, during the December 1992 exam, when we were there during January and February of 1993, that I did not deal with Mr. Sarsfield. But I can't answer that for the time period during the fourth quarter of 1992 because I wasn't involved in the monitoring or examination of the Bank at that time.

MR. MC CANN: Your Honor, this would be the logical cut-off point for the cross. I'm not done, but I . . . .

[Rec. Dec. 28, 1993]

UNITED STATES OF AMERICA

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF: WILLIAM C. SARSFIELD,
Former Chairman of the Board and Current Director;
KENT D. GLOVER, Former President and Current Director;
CHARLES PUCCINELLI, PETER P. BOLLES, THOMAS J.
NIEDERMEYER, SR., and RICHARD C. VAN VALER,
All Former Directors;
JOHN F. HENNING, JR., and NORMAN I. KRUG,
Current Directors, of SEQUOIA NATIONAL BANK,
San Francisco, California

Answer of Respondent William C. Sarsfield
to Notice of Assessment of a Civil Money Penalty

TO: The Comptroller of the Currency
of the United States of America

Respondent William C. Sarsfield, on behalf of himself alone, answers the Notice of Assessment of a Civil Money Penalty in the above-reference action as follows:

ARTICLE I

1. Admit.
2. Admit.
3. Admit.

ARTICLE II

1. Respondent admits the allegations in this paragraph, except that Respondent denies any violation of the Order and further denies the accuracy of the description of such alleged viola-tions contained in the June 30, 1992 ROE, and the December 31, 1992 ROE.
2. Denied.
3. Denied.
4. Denied.
5. Denied.
6. Denied.
7. Denied.
8. Denied.
9. Denied.

ARTICLE III

1. Denied.

AFFIRMATIVE DEFENSES

Respondent alleges that as of the first week of September, 1992, Respondent was no longer an officer of the subject Bank active in its management. Without admitting the accuracy of any of the alleged violations of the Order, Respon-dent alleges that, to the extent any such violations occurred, they were the result of failures to act by management of the Bank after the first week of September of 1992, and Respondent denies any responsibility for any such alleged violations.

WHEREFORE, Respondent denies that the Comptroller is entitled to any of the relief prayed for against this Respondent.

DATED: December 23, 1993

/s/ Michael W. McCann
CAPPELLO, FOLEY & BEZEK
831 State Street
Santa Barbara, California 93101
(805) 564-2444
Attorneys for Respondent
William C. Sarsfield

(ER 39)

[Rec. Dec. 28, 1993]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF:
WILLIAM S. SARSFIELD, Former Chairman of the Board
and Current Director;
KENT D. GLOVER, Former President and Current Director;
CHARLES PUCCINELLI, PETER P. BOLLES, THOMAS J.
NEIDERMEYER, SR., and RICHARD C. VAN VALER,
All Former Directors;
JOHN F. HENNING, JR., and NORMAN I. KRUG,
Current Directors, of SEQUOIA NATIONAL BANK,
SAN FRANCISCO, CALIFORNIA

Request for Private Hearing by Respondent
William C. Sarsfield

To: The Comptroller of the Currency of the
United States of America

Respondent William C. Sarsfield hereby requests, pursuant to 12 C.F.R. 19.19, and 12 C.F.R. 19.33, a private hearing with respect to the Notice of Assessment of a Civil Money

Penalty issued on November 20, 1993 by the Comptroller in the above-referenced proceeding.

Respondent makes this request on the following grounds:

1. The pre-trial discovery and hearing in this matter will necessarily involve disclosure of confidential trade secrets of Sequoia National Bank ("the Bank").

2. The pre-trial discovery and hearing in this matter will necessarily require disclosure of personal financial information of individual customers of the Bank whose rights to privacy will be violated by public disclosure.

3. The pre-trial discovery and hearing in the matter will necessarily involve disclosure of disputes and disagreements within the management of the Bank relative to the Order and Notice of Assessment, which disclosure will be injurious to the Bank, as well as the individuals involved.

4. The pre-trial discovery and hearing in the matter may possibly involve disclosure of disagreements and disputes internally to the Office of the Currency of the Comptroller.

DATED: December 23, 1993

/s/ Michael W. McCann
CAPPELLO, FOLEY & BEZEK
Attorneys for Respondent
William C. Sarsfield

[Filed Nov. 20, 1993 (pp. 1-7 only)]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTERS OF:
WILLIAM C. SARSFIELD, FORMER CHAIRMAN OF THE BOARD AND CURRENT DIRECTOR;
KENT D. GLOVER, FORMER PRESIDENT AND CURRENT DIRECTOR;
CHARLES PUCCINELLI, PETER P. BOLLES, THOMAS J. NIEDERMEYER, SR., AND, RICHARD C. VAN VALER, ALL FORMER DIRECTORS;
JOHN F. HENNING, JR. AND NORMAN I. KRUG, CURRENT DIRECTORS, SEQUOIA NATIONAL BANK
SAN FRANCISCO, CALIFORNIA

Notice of Assessment of a Civil Money Penalty

To: William C. Sarsfield, former Chairman of the Board and current Director; Kent D. Glover, Former President and current Director; Charles Puccinelli, Peter P. Bolles, Thomas J. Niedermeyer, Sr., and, Richard C. Van Valer, all former Directors; John F. Henning, Jr. and Norman I. Krug, current Directors, of Sequoia National Bank, San Francisco, California

The Comptroller of the Currency of the United States of America ("Comptroller") hereby assesses civil money penalties against William C. Sarsfield ("Respondent Sarsfield"), Kent D. Glover ("Respondent Glover"), Charles Puccinelli ("Respondent Puccinelli"), Peter P. Bolles ("Respondent Bolles"), Thomas J. Niedermeyer ("Respondent Niedermeyer"), Richard C. Van Valer ("Respondent Van Valer"), John F. Henning ("Respondent Henning"), and Norman I. Krug ("Respondent Krug") (or, collectively "Respondents") pursuant to the provisions of 12 U.S.C. § 1818 (i). These assessments are issued on the basis the hereinafter described violations of a final order issued pursuant to 12 U.S.C. § 1818(b) (hereinafter referred to as the "Order"). All the violations of the Order occurred at Sequoia National Bank, San Francisco, California ("Bank").

After taking into account the size of the financial resources and good faith of the Respondents, the gravity of the violations, the history of previous violations and such other matters as justice may require, as required by 12 U.S.C. § 1818 (i) (2) (G), and after soliciting and giving full consideration to the Respondents' views with respect to these considerations, the Comptroller hereby assesses the following civil money penalties against the following Respondents:

William C. Sarsfield	$15,000
Kent D. Glover	$15,000
Charles Puccinelli	$5,000
Peter B. Bolles	$5,000
Thomas J. Niedermeyer	$5,000
Richard C. Van Valer	$5,000
John F. Henning	$5,000
Norman I. Krug	$5,000

These civil money penalties are payable to the Treasurer of the United States.

These assessments are based on the following:

ARTICLE I

(1) The Bank is a national banking association, chartered and examined by the Comptroller, pursuant to the

National Bank Act of 1864, as amended, 12 U.S.C. § 1 et seq., and an insured depository institution within the meaning of 12 U.S. C. §§ 1813 (c) and 1818 (I).

(2) The Comptroller is the "appropriate Federal banking agency" within the meaning of 12 U.S.C. §§ 1813 (q) (l) and 1818 (i) (2) (E).

(3) At all times relevant herein, Respondents were directors and/or officers of the Bank and institution-affiliated parties within the meaning of 12 U.S.C. §§ 1818(u) and 1818(i). In these capacities, Respondents were under a statutory and fiduciary duty to supervise the Bank's affairs in accordance with all applicable laws, rules, and regulations.

ARTICLE II

(1) The Bank entered into the Order with the Comptroller on March 4, 1992, and entered into an Amendment regarding the same Order on February 3, 1993. Details of the Bank's violation of the Order are described in the June 30, 1992 Report of Examination ("ROE)" and the December 31, 1992, ROE. Copies of relevant excerpts from the ROE's are attached hereto as Appendix A.

(2) For purposes of this action and as of December 31, 1992, Respondents caused, brought about, participated in, counseled, or aided or abetted the Bank's failure to comply with the following articles of the Order: Articles VI, VII, IX, X, XII, XIII, and XV.

(3) In violation of Articles VI and as of December 31, 1992, the Board failed to immediately increase or maintain the liquidity of the Bank which was sufficient to sustain the Bank's current operations and to withstand any anticipated or extraordinary demand against its funding base; failed to develop and implement a program to improve the Bank's liquidity position within forty-five (45) days of entering into the Order; and, failed to ensure that a liquidity contingency plan was developed within sixty (60) days of entering into the Order.

(4) In violation of Article VII and as of December 31, 1992, the Board failed to adopt and implement a plan, with specific timeframes, to reduce the Bank's reliance on volatile liabilities through the development of alternative funding sources and failed to establish time limitations on the use of volatile liabilities as a funding source within thirty (30) days of entering into the Order.

(ER 38)

(5) In violation of Article IX and as of December 31, 1992, the Board failed to revise its written loan policy within sixty (60) days of entering into the Order.

(6) In violation of Article X and as of December 31, 1992, the Board failed to formulate and ensure implementation of an effective and independent loan review program for the purpose of assuring the timely identification of problem loans in the Bank's loan portfolio. The Bank failed to comply with the provisions of Article X within sixty (60) days of entering into the Order.

(7) In violation of Article XII, contrary to Banking Circle 201 and as of December 31, 1992, the Board failed to establish a program for a maintenance of an adequate Allowance for Loan and Lease Losses.

(8) In violation of Article XIII and as of December 31, 1992, the Board failed to obtain current and satisfactory credit information on all loans lacking such information, including those loans listed in any ROE or in any listings of loans lacking such information provided to Bank management at the conclusion of any examination.

(9) In violation of Article XV, as of December 31, 1992, the Board failed to maintain Tier 1 capital at least equal to eight percent (8%) of risk-weighted assets.

ARTICLE III

(1) As evidenced by the actions of all the Respondents as described in Article II above, Respondents failed to comply with the Order.

WHEREFORE, the Comptroller, through his authorized representative whose hand appears below, hereby assesses the above-described penalty, effective immediately.

TAKE NOTICE, Respondents are hereby afforded the opportunity for a hearing before the Comptroller concerning these assessments, pursuant to 12 U.S.C. § 1818 (i)(2)(H), if a request for such a hearing is made within twenty (20) days of service of this Notice of Assessment ("Notice"). Any request for such a hearing shall be filed with the Office of Financial Institution Adjudication, 1700 G Street, N.W., Washington, D.C., 20552, with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C., 20219, and served with Javier A. Maymir, Attorney, Enforcement and Compliance Division, Office of the Comptroller of the Currency,

250 E Street, S.W., Washington, D.C., 20219, and such hearing shall be conducted pursuant to 12 C.F.R. Part 19, which requires Respondents to file an answer within twenty (20) days after service of this Notice.

The hearing afforded the Respondents shall be open to the public unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest.

If Respondents fail to request a hearing within the above twenty (20) day period, this Notice shall constitute a final and unappealable order, pursuant to 12 U.S.C. § 1818 (i) (2) (E) (ii). In addition, if Respondents fail to file an answer to this Notice within twenty (20) days of service, as required by 12 C.F.R. § 19.19, such failure shall constitute a waiver of the right to appear and contest the allegations contained in the Notice, and may cause the Administrative Law Judge to find the facts in this Notice to be as allege, upon which an appropriate order may be issued.

Remittance of this civl money penalty shall be payable to the Treasurer of the United States and delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

PRAYER FOR RELIEF

WHEREFORE, the Comptroller prays for relief in the form of the issuance of a final Order of Assessment directing Respondents Sarsfield and Glover to pay civil money penalties in the amount of fifteen thousand dollars ($15,000) each and Respondents Puccinelli, Bolles, Niedermeyer, Van Valer, Henning and Krug to pay civil money penalties in the amount of five thousand dollars ($5,000) each.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. this 20th day of November, 1993.

/s/ Stephen R. Steinbrink
STEPHEN R. STEINBRINK
Senior Deputy Controller
Bank Supervision Operations

OCC EXHIBIT 158

MEMORANDUM

July 9, 1991

TO: WCS; Board of Directors

FR: JFH

RE: Board Inquiries; special meeting - July 9, 1991

1. Introduction: within the last sixty days from the date above, certain events have allegedly occurred which have raised certain concerns with the operations of SNB under the applicable regulatory scheme of National Banking Act and other relevant legislation. These events consist of certain statements, actions or policy decisions attributed to you and Kent Glover respecting SNB's operations. While all of these allegations may be baseless or consist of a misreading of the apparent facts, under the strict fiduciary standards imposed upon the Board of Directors under 12 USC §93, inter alia, the Board is obliged to investigate any claim or suspicion that a regulatory or statutory violation has occurred. Based on the review of the below described items in your meeting with me on July 5, 1991, it would appear that a clarification of these events from your

standpoint is available and would go a long way toward resolving the concerns posed by the facts as presently alleged. As you can well understand, to the extent that some of these claims involve SNB employee sources, their anonymity must be preserved, to the extent possible, under the anti-retaliation/whistle-blower legislation of FIRRE, (12 USC § 1831j) and Title VII (42 USC § 2000e-3(a)).

In addition to these regulatory concerns, the Board also wishes to informally discuss and review management's ideas and concepts on the future direction of the bank and the Board's concerns over its growth and development.

For purposes of discussion this date, therefore, the Board's concerns, as I can best determine them, are outlined below followed by a possible course of action if the factual allegations are determined by all to be true:

2. Concerns and Inquiries: The Board is concerned over the regulatory ramifications of certain alleged factual and policy situations which have arisen recently that cause it to inquire as to the following items:

(a) Personnel:

(1) whether or not an automobile, presently owned and registered to SNB, in addition to that presently provided to WCS, is being operated on a daily commute basis by Molly Sarsfield and whether the garage fees and insurance on this second car are being paid by SNB? How long has this condition prevailed? Was the automobile sold or transferred to Molly Sarsfield? (Mismanagement of Assets)

Action/Remedy: Effect transfer of registration, track sale proceeds?

(2) Whether or not Matthew Sarsfield was hired, without prior banking experience, as a teller at a monthly salary approximately three hundred dollars more than female tellers with prior banking experience, such as Yvonne Petrunin? Whether or not, when the issue of this apparent discrimination was brought to the attention of WCS by a senior officer, WCS dismissed this complaint and advised said person that "the only problem the other employees of this bank have is not being born with the last name of its president," or words to this effect. Is Matthew Sarsfield's job description as teller unique? Can his job duties be described as substantially the same as the female tellers? (Title VII, 42 USC § 2000e; Equal Pay Act, 29 USC §206)

Action/Remedy: Provide individual job descriptions, equalize pay, provide Matthew Sarsfield and other employees with overtime pay?

(3) Whether or not WCS advised a senior officer within the last thirty days that it was his wish that it be determined which of the bank's employees could be described as "loyal" to WCS, and which of the bank's employees could be described as "enemies," and that the enemies be fired and thrown out of the bank, or words to this effect? Was this statement meant as a joke, or made in a fit of pique? (Wrongful discharge; FIRRE Retaliation, 12 USC § 1831j)

Action/Remedy: Apologize, disavow, post equal treatment notice if necessary?

(4) Whether or not WCS used the secretarial services of Kathleen Long during the normal business hours of SNB for the unrelated business purpose of assisting WCS in the conduct of his consulting/expert witness business, for which services Ms. Long was paid an additional $400-$500 a month? For how long has this, or any similar arrangement, been in place? Was a like amount of $400-$500 deducted from Ms. Long's bank salary, or was Ms. Long also paid for the time devoted to these secretarial services by the bank? What is the

normal secretarial salary for a bank secretary? (Mismanagement of Assets)

Action/Remedy: Reimbursement of the $400-$550 in bank time devoted each month by Ms. Long to WCS unrelated business; confirm position pay?

(b) Management:

(1) Whether or not it was represented to any regulatory agency that Kent Glover would serve and function as the de facto CEO of SNB, while WCS remained and/or assumed duties restricted to the Board of Directors? Was a table of organization provided any regulatory agency outlining the respective duties of Kent Glover and WCS? (Filing misrepresentations - personnel; 12 CFR 5.20(2)(ii),(4)(11); 18 USC § 1001)

Action/Remedy: Provide documentation of thrift and NB applications, filings with OCC re table of organization; amend filings if necessary?

(2) Whether or not there exists any legal impediment, or regulatory restriction pertaining to the prior employment of WCS at Commercial Bank, which would prevent WRS's assumption of CEO duties as president of SNB?

Is the present employment or exercise of banking duties by WCS consistent with such prior restrictions to the extent that they exist?

Action/Remedy: Amend prior filings if necessary; secure OCC approval for WCS to assume CEO responsibilities if necessary?

(3) Whether or not there existed, at any time within the last four years, an understanding as between WCS and Kent Glover that his physical attendance at the premises of SNB would be effectively excused, or not required, for at least three weeks of every month? What has been the attendance pattern of Kent Glover at SNB for the last four years? Is it contended that the Board had knowledge of such an arrangement and so approved it? (International Bank v. Bennet, 513 So.2d 1294 (Fla. App. 1987) [payment for unrendered services])

Action/Remedy: Prepare written job description; require salary adjustment and reimbursement if necessary; redefine functions of executive personnel?

(4) Whether or not there existed, at any time within the last four years, an undertanding between WCS and the Board that WCS's contract of employment was based on "performance alone" without reference to full time attendance

to the affairs of SNB during normal banking hours? Was such an understanding, if it existed, a formal or informal understanding with the Board? Was this understanding communicated to the stockholders or any regulatory agency?

Action/Remedy: Prepare written job description; prepare employment contract; redefine functions of executive personnel?

(5) Whether or not there existed, at any time within the last four years, an understanding as between WCS and the Board that WCS was authorized to conduct an unrelated consulting/expert witness business during normal banking hours which resulted in an average annual personal income between $150,000-$200,000? What is the "principal occupation and employment" of WCS for purposes of the proxy statements? Do any of the clients of WCS's consulting/expert witness business pose a conflict of interest in the operations or policies of SNB? Did the past conduct of such an unrelated business deter any efforts by WCS from selling SNB to another financial institution? Is the provision of consulting/expert witness services to a third party considered by WCS as a corporate opportunity or asset for which the bank could charge to a third party? (Garner v. Pearson, 545 F.Supp. 549 (MD Fla. 1982) [corporate opportunity must be shared with corporation])

Action/Remedy: prepare written job description; require salary adjustment or curtailment of consulting/expert witness employment; redefine functions of executive personnel; require disclosure of client list and hourly billings for last four years to determine extent of "outside" employment; determine corporate opportunity status?

(6) Whether or not WCS will curtail or abstain from outside employment while employed in an executive position with SNB? If so, under what circumstances?

Action/Remedy: Prepare written contract of employment specifically referencing outside employment; adopt conflict of interest-policy?

(7) Whether or not negotiations have been conducted with the Russian government, or its agents, for the hiring of WCS and/or Kent Glover to serve as consultants to that government? What are the terms of compensation proposed for such services, and will SNB be the recipient of such services? Do such services require regulatory approval and/or is there any potential conflict posed to SNB by the performance of such services. Is the provision this consulting/expert witness service considered by WCS as a corporate opportunity or asset for which the bank could charge

the Russian government? (Foreign banks - 12 USC §§ 3101 et seq.)

Action/Remedy: Require the preparation of a contract for consulting/expert witness services as between SNB and the Russian government; seek regulatory review?

(c) Regulatory Agency Interface:

(1) Call Reports: Whether or not a continuing dispute exists between WCS and a senior bank officer regarding the completion of call reports concerning the bank's financial condition as it pertains to the "booking" of loans? Whether or not a senior bank officer has repeatedly refused to sign off on call reports where home loans, vice equity loans, have not been funded and interest accrued thereon? Whether WCS has forced a senior bank officer to sign off such call reports despite the foregoing objections? What is the applicable regulatory rule respecting the "booking" of home loans? (False entries - 18 USC §1005)

Action/Remedy: Determine GAAP/RAP rule and amend reports if necessary?

(2) CRA Plan: Whether or not the Examiners proposed to rate our CRA (Community Reinvestment Act) Plan unsatisfactory during a recent examination on the grounds, inter

alia, that SNB had failed to demonstrate the investment of a single dollar in its "local community" of San Francisco? What would have been the economic consequences of an unsatisfactory rating to SNB? Which executive officer is primarily responsible for the compliance requirements pertaining to SNB's CRA Plan? Should the Board have been more involved in the review of the CRA Plan? (12 USC §§ 2901 et seq.)

Action/Remedy: Reassign CRA responsibilities, require new CRA proposal for Board approval?

(3) Liquidity: Whether or not SNB's failure to maintain "sufficient" liquidity, without reliance on the Federal Home Loan Bank equity line, creates any regulatory risks? Did the Examiners criticize SNB's reliance upon "hot money" deposits in the latest examination? Which executive officer is primarily responsible for maintaining an appropriate liquidity ratio? Why hasn't a program been developed for increasing core deposits in view of Board's historical requests? Has the lack of liquidity or a core deposit base deterred prospective purchasers? Could it affect our capital ratio?
(12 CFR 3.10)

Action/remedy: Develop core deposit program?

(d) Board of Directors:

(1) Document Requests: Whether or not Director Van Valer has been denied an opportunity to inspect SNB's shareholder list by WCS; and whether or not on July 5, 1991, I was inappropriately denied copies of SNB's corporate by-laws and public filings for thrift and NB charters by WCS without submitting a written request for same and providing a justification for request. (12 USC § 71)

Action/remedy: Misunderstanding of requests, clarification of policy, apology?

(2) Telephone Vote Policy: Whether or not it is appropriate, in view of the lack of by-law provision, to continue the practice of recording "telephone votes" as effective votes as if the Director involved was "present" at the meeting and reflecting in the minutes that such Director was "present"? (Letter No. 308; 12 USC § 73)

Action/remedy: Terminate practice, discuss amendment of by-laws?

(3) Lack of Committee Meetings: Whether or not SNB is delinquent in not implementing "Loan," "Investment," and "Examining" Committees provided under By-laws (Art. IV)? (12 USC § 71)

Action/remedy: Schedule committee meetings with agenda prepared by management at earliest opportunity?

(4) Intemperate Statements: Whether or not the following statements were made by WCS ("you") to me in jest, out of pique or with malicious intent?

1. That on June 28, 1991, in the presence of Kent Glover, you advised me that I was "fired" as a Director of SNB for my failure to previously warn you of the questions posed by the Board to you on the prior Board Meeting of June 26, 1991, or words to this effect;

2. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that if I was willing to resign as a Director of SNB, you would retain me as Counsel to SNB for a monthly retainer of $500, for which fee, as you advised another Director, I would not be expected to render services, or words to this effect;

3. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover you presented me with a written proposal, typed by Kathleen Long, providing for my resignation and retention as Counsel.

4. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that my fiduciary duty was owed only to two of the bank's shareholders which were identified as you and Kent Glover, or words to this effect;

5. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that I, as Counsel to the bank, had an obligation to you to keep you advised of the plans, meetings and intentions of the other Directors as they affected the operations of the bank, or words to this effect;

6. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that the Board had no right whatsoever to question your administration of the bank so long as the operating results were positive, or words to this effect;

7. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that you had no obligation to respond to inquiries from the Board unless you determined that the inquiries were coming from so-called "good guys," or words to this effect;

8. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, in connection with your recent offer to buy 30,000 shares of SNB stock at $4.24/share, discussed below, you offered to procure an interest only loan to enable me to participate in such a purchase with you if I would only consider myself a "good guy" and side with you and Kent, or words to this effect;

9. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that you and Kent had devised a close-down plan that would bring the bank down around your shoulders in the event that your control was threatened and that such a plan was designed to thwart the proposed take over of the bank by former Director Eagan, or words to this effect;

10. That on June 28, 1991, between 12:30-1:30 p.m., in the presence of Kent Glover, you advised me that I had until 3:00 p.m. that day to resign or I would be "through;" and that I was to telephone you at 3:00 p.m. for that purpose, or words to this effect;

11. That on June 28, 1991, at 3:00 p.m. after my statement to you that I did not intend to resign, you advised me

that you had no intent of running the bank with the consensus of the Board and that all future decisions would be unilaterally made by you, or words to this effect;

12. That on June 28, 1991, at 3:00 p.m., you advised me that you were offering me my last chance to side with the "good guys" against the Board and again asked me to resign from the Board, or words to this effect;

13. That on June 28, 1991, at 3:00 p.m., you advised me that if the Board persisted in its resistance to you, you would "come back like a resurrected Hitler and this time it would be no more nice guy," or words to this effect;

14. That on June 28, 1991, at 3:00 p.m., you again advised me that you were capable of bringing the bank down around your shoulders if pushed too hard by the board, or words to this effect;

15. That on June 30, 1991, at 10:00 a.m., you telephoned me at my home and advised me that I was again fired both as Counsel and as a Director of SNB and that I would have nothing more to do with the bank, or words to this effect;

16. That on June 30, 1991, at 10:00 a.m., you again advised me that if I was willing to walk away, I would be retained as Counsel for $500 per month, or words to this effect;

and,

17. That on June 30, 1991, at 10:00 a.m., you advised me that if I continued to refuse to resign as Counsel or as a Director, you intended to put my brother, Thomas Henning, on the telephone at the bank on Monday morning, July 1, 1991, for the purpose of having him request my resignation "for the good of the bank," or words to this effect. (12 USC §71)

Action/remedy: Apologize for remarks, explain that they were said in pique or jest?

(e) WCS Proposed Stock Purchase: Concern has arisen over a purported offer by WCS to purchase 30,000 shares through Hofer and Arnett for the price of $4.25. This information was allegedly forwarded by Hofer and Arnett to First Interstate, at that bank's request, and had the effect of causing First Interstate to require Director Bray to recollateralize his loan because of the drop in the value of SNB stock allegedly caused by WCS's bid. The question is posed as to what are the circumstances of this offer and the propriety of a SNB executive officer/insider publicly bidding SNB stock at

the low end of the market? In connection with the apparent offer to me and other Directors by WCS to procure for them interest only loans to take down this stock at $4.25, would such a proposal appear an inappropriate attempt to lower the market for SNB stock in order to increase the leverage of the bank's officers participating in such a scheme? (SEC §10(b); Rule 10b-5 -disclose or abstain; obtaining loan on terms more favorable than those afforded other borrowers from corresponding bank, 11 USC § 375a.)

Action/remedy: Explain circumstances, propose policy on public bidding for SNB shares; clarify intent/ policy regarding procurement of interest only loans for Directors?

(f) Future Direction and Development: Assuming that there are no realistic prospects for a sale of the institution at an acceptable price, concerns have arisen about the future direction and development of SNB which require that the following items, inter alia, be addressed:

(1) Employment of a Full time Executive Officer: In view of the apparent fact that there does not appear to be a CEO dedicated to the bank's needs on a full time basis, should some thought be given to the curtailment of the salaries of WCS and Kent Glover to support the employment of a full time

executive officer to administer the bank's affairs? What are the relative advantages and disadvantages of such a proposal?

(2) SNB's Financial Condition: What is SNB's financial condition by the CAMEL rating? While the bank's growth and earnings can be manipulated by lowering lending standards, increasing CD rates, and selling off the loan portfolio, would such a possible approach be a legitimate means of growth that will eventually attract a purchaser, enable the bank to pay out dividends, or increase the value and market for the bank's shares?

(3) Compensation Package: Should the issue of compensation, health and retirement benefits be reviewed for both officers and employees of SNB to bring them up to peer level for comparably sized banks?

(4) Performance Contract: What are the relative advantages to the bank, the shareholders, and the affected officers of conditioning compensation on a performance standard in order to increase the value of the bank? What is an appropriate performance standard?

(5) Staffing: Are we understaffed to provide normal banking services for an institution of our size? Is the establishment of a Compliance Committee really necessary after all?

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OCC EXHIBIT 159

July 1, 1991

MEMO TO FILE

RE: Sequoia National Bank (Certif. No. 26907; Bank No. 061486; Charter No. 21337); William S. Sarsfield; NBA/Fiduciary Violations.

1. **Financial Status Comments:** With the exception of its liquidity ratio, SNB meets all peer group thresholds. Its counter statement reflects $40M in assets. A review of all call reports confirms diligent, consistent adherence to GAP practice, all figures being true and current accounts of the assets and liabilities of the bank's operations. With respect to the bank's liquidity ratio, it is SNB's present plan to expand its Federal Home Loan credit line to 7M to meet its current liquidity shortfall perceived to be at a self-deduced 2.43% versus 20% goal. SNB's asset base consists of $33M in interest sensitive CDs which constitute 75% of total assets. Its loan portfolio is strong with a well secured loan base of conservatively appraised real property.

No financial misfeasance is noted or suggested.

2. **Current Board Dissension:** Within the last sixty days from date above, certain events have allegedly occurred which have raised certain concerns with the operations of SNB under the applicable regulatory scheme of the National Banking Act and other relevant legislation. These events consist of certain statements and actions attributed to SNB's Chairman of the Board, William S. Sarsfield, and SNB's President, Kent Glover. The following chronological recitation of relevant events is presented as the context of those alleged statutory violations set out infra at paragraph 4, to wit:

(1) SNB Board Meeting of May 29, 1991: An examination of the Board's minutes and of the Directors in attendance indicates that the issue of liquidity was addressed. Director Van Valer urged that SNB adopt a program to develop core deposits, a continuing request that he has apparently made for the last three years with the support of the Board and SNB's V.P. Beverly Williams. In response, Sarsfield reported that SNB's lines of credit with First Interstate and Wells Fargo had been terminated the prior week creating a liquidity squeeze which he intended to resolve by reliance on SNB's equity line with the FHLB which he hoped to expand to $7M which would resolve the liquidity problem. Sarsfield made no response to additional questioning by Van Valer on the issue of developing a core deposit program. At the close

of the agenda, Pres. Glover advised the Board that he wished at that time to move to increase the salary of Chairman Sarsfield from $54,800 to $78,800 effective June 1, 1991. This amount did not include the auto allowance and insurance package already provided Sarsfield. When Director Henning asked Pres. Glover why an increase of salary was not proposed for his position, he responded that he desired no increase in salary. Pres. Glover then went on to say that he believed that Chairman Sarsfield deserved a raise because he was increase in salary. Pres. Glover then went on to say that he believed that Chairman Sarsfield deserved a raise because he was now willing to "put in full time to the job." When pressed by the Directors what was meant by that comment, Chairman Sarsfield stated that he had been engaging in expert witness consultation over the past years which had brought him an annual income of approximately $220K a year. Despite that fact, he felt he could now devote full time to his position with the bank for which he felt he was entitled to compensation on par with peer banks with equal performance results. The Board adopted the pay raise for Chairman Sarsfield unanimously.

(2) Director Discussions, May 30 - June 7, 1991:

Subsequent to the May 29, 1991, certain discussions were had amongst the Directors on the subject of outside consulting by Chairman Sarsfield. While the matter had never been formally addressed by the Board or Sarsfield, the Directors opined that while they had seen various legal documents on his desk or heard reference to his consulting activities, all assumed that it did not amount to more than $5-8K a year. There was some concern expressed by certain Directors that at a rate of $100.00 per hour, this would amount to 2000 hours annually devoted to outside consulting. On or about June 4, 1991, Director Henning expressed his surprise to Chairman Sarsfield about the amount of consulting reported to the Board. Chairman Sarsfield stated that the whole Board has known about the matter for years. There appears to be no evidence that any Director knew about this matter prior to May 29, 1991.

(3) Director Discussions, June 8 - 26, 1991: In the ensuing weeks prior to the Board meeting of June 26, 1991, Directors Bray, Henning, Krug and Van Valer had multiple conversations regarding the operations of SNB and Messrs. Sarsfield and Glover; and, based on their inquiries and various rumors, allegations and suspicions, came to the conclusion that there existed good cause to pursue claims that:

(a) Sarsfield and Glover had caused the organization of Sequoia Savings Bank and its successor, SNB, based on certain representations to regulatory agencies that Glover would be and continue as the CEO/President of these organizations while Sarsfield's efforts would be limited to the holding company, in the case of the thrift organization, and to the role of Chairman of the Board in the later case of SNB. This representation was made necessary, allegedly; because Sarsfield had been "banned" from bank administration under a prior OCC supervisory agreement with Commercial Bank which, allegedly, resulted in his being forcefully being removed from the premises of Commercial Bank by private security personnel. Based on this prior experience, Sarsfield was of the opinion that the OCC would not allow him to operate as a CEO of Sequoia.

(b) In return for allowing Glover's assistance with processing the thrift and SNB applications, Glover exacted an arrangement, allegedly, whereby he would abdicate de facto CEO duties in favor of Sarsfield and retire to Carmel. His duties would be limited to attending Board meetings, dealing with the regulators whenever they were on the premises, checking the call reports and procuring CD's through prior professional associations. Glover was at

all times, in this regard, represented to be a "regulator" who knew everyone and could keep the regulators "off our backs" according to Sarsfield. The net result of this arrangement was that for the last three to five years, Glover has been present on SNB's premises approximately three days of each month, with the remaining time spent at his home in Carmel. These allegations have been largely supported by SNB staff. For these "duties" Glover has received an annual salary of $50,000 plus insurance. When pressed by different Directors as to what Glover was doing, Sarsfield responded variously that - Glover was retired effectively because all the male members in his family died an early death and he didn't want to die at his desk; Glover wasn't working anymore and the salary being paid him was to meet his loan payments on the stock that he had purchased in SNB; Glover and Sarsfield were an inseparable team that was producing the income results desired and no question could be put to them regarding who showed up at work.

(c) None of the Board Committees were effectively functioning anymore. Sarsfield had failed to use the services of the Loan Committee for the last two years and had suspended any attempt to review loan applications with the Committee as he had previously done. All loan applications were reviewed and approved by him

personally. The Board's Executive Committee, which was formed and designed to build core deposits and expand business opportunities, had not met at all for the past four years despite repeated requests by Board members for such meetings. The Audit Committee was not called to review the financial reports or meet with the auditors as was the customary practice in the first years of operation, reducing the Audit Committee to calling the auditors individually to assess the status and contents of various reports.

(d) Various reports had been received by Directors from James Eagan a former Director, and other stockholders that SNMB was run on a daily basis, albeit very successfully, solely due to the efforts of Vice Presidents Beverly Williams and Eva Silva. The bulk of the day was spent by Sarsfield on his consulting business for which he employed the use of SNB employee Katherine Long and used the banks mailing and messenger service in the operation of his consulting business.

(e) Sarsfield had hired his son, Matthew Sarsfield, as a teller. Matthew Sarsfield had no prior banking experience. Similarly; Sarsfield hired his daughter, Molly Sarsfield, as SNB's Loan Administrator. Molly Sarsfield had no prior banking experience.

Thereafter certain complaints were made by co-employees that Molly Sarsfield was not coming in or having her work transferred to other employees. It was also alleged that Matthew Sarsfield was being paid in excess of that salary paid to female tellers with prior banking experience, viz., Yvonne Petrunin. When these complaints were brought to Sarsfield's attention by V.P. Beverly Williams, Sarsfield advised Williams that the other employees of the bank "had not been blessed by being born with the same last name of its president, and so they could lump it."

(f) Sarsfield had begun negotiations with the Russian Government within the last month to secure his hiring and that of Glover as consultants to the Russian Government on banking matters, which consultation would require their travel to Russia. It was also alleged that Sarsfield had a consulting agreement with the Indonesian government to conduct banking seminars for an annual two week period in Jakarta. There was also speculation that Sarsfield's expert witness work was on behalf of various plaintiff parties suing National Banks, which had so annoyed the banking community that it resulted in the termination of SNB's equity lines at First Interstate and Wells Fargo. Sarsfield had been quoted as stating that he had the expert witness business sewed up nationally since he was the only bank

president that could sit as an expert witness; that he could not allow the bank to get into any trouble with the regulators since it would be the end of his expert witness work; and that he was earning in excess of three hundred thousand dollars a year as an expert witness. It was also commonly admitted among Directors that Sarsfield had a strong tendency to exaggerate matters involving himself.

(g) Sarsfield was opposed to any program to build core deposits because it was easier to meet liquidity through reliance on equity lines of corresponding banks or the FHLB. Moreover, as he constantly bragged, he controlled the core depositors since they were former clients and/or acquaintances from Commercial Bank; and, if he was ever threatened by a takeover or the regulators, he and Kent could "collapse the bank around them like Sampson." Sarsfield apparently made numerous other statements in this regard to the effect that he would never meet liquidity requirements through recapitalization since this would dilute his interest and he would rather have the bank collapse than have his interest diluted.

(h) Various reports and allegations were made that Victor Granholm, who served as the Board's Vice Chairman, had also served as "window dressing" to get SNB's thrift and NB charters

through; that he had no real function at the bank, that he had been employed full time at another bank on the Peninsula; that his only duty was to show up at the monthly Board meetings; and that he was given various consulting assignments by Sarsfield in order to allow him to pay his bank loan on his SNB stock.

(i) A consensus was reached amongst Directors Bray, Henning, Krug and Van Valer that they were confronted with a very difficult at delicate situation that required immediate remedy. It was their shared conclusion that neither Sarsfield nor Glover were taking care of business and that a "professional banker" had to be brought in on a permanent basis while the Board investigated the truth of the foregoing allegations.

(j) A consensus was also reached amongst Directors Bray, Henning, Krug and Van Valer that dealing with Sarsfield would be quite difficult. At Sarsfield's initiation, Director Henning's brother, Thomas R. Henning, was requested to apply for employment with SNB and over the years had risen to his current position of Assistant Vice president. Director Henning's family had been connected with Sarsfield for many years and another brother, Daniel Henning, had been formerly employed with Sarsfield at the Commercial Bank. Director

Bray's daughter, Florence Bray, was also employed at SNB; and for these reasons there was some anxiety about the effect their inquiries might have in the matter of their family members. Notwithstanding, it was mutually agreed that the foregoing matters would all be brought up at the next Board meeting on June 26, 1991, and that a separate meeting in executive session would be called to investigate these matters in depth without the presence of bank staff.

(3) SNB Board Meeting of June 26, 1991: In moving through the regular agenda for the Board meeting, the issue of SNB's liquidity was again raised and debated by Sarsfield and the Board. With Van Valer again complaining about the lack of a program to develop core deposits, Sarsfield informed the board that while the issue had reached a critical stage, he had together with the FHLB worked out a perfect solution which would solve all our problems and make us a lot of money at the same time. Based on his relationship with the FHLB, and the fact that the FHLB wanted to use SNB as an example to attract other smaller banks to its membership, the FHLB would increase our equity line to $7M or more at a favorable cost of 1/8 of 1% of commitment. When asked by Director Van Valer as to whether this line was "guaranteed," Sarsfield replied that the FHLB would give him its personal guarantee that they wouldn't "jerk" the line. When

Director Bray asked whether this would meet the OCC's liquidity requirements, Sarsfield said that the OCC wouldn't have a choice; that he and the FHLB had decided that this equity line arrangement would be very attractive to potential FHLB members and that in cooperation with the FHLB he, Sarsfield, would author a professional article on the advantages of the FHLB's line, which article would force the OCC into cooperation. According to Sarsfield, the FHLB had told him that this had worked on prior occasions. When Director Bray observed that this was a dangerous tactic to pursue vis-a-vis the OCC, Sarsfield replied that SNB had no choice and that he would decide the matter. Bray replied that he would rather see us go for core deposits than go down such a risky path. Sarsfield then declined to discuss the matter further.

Matters came to a head, however, at item 7 of the agenda, involving the "Review, Compliance/Operations Committee." As described by Sarsfield and Glover, this was another committee that would have to be set up "to get the regulators off our backs." It was designed to assure that we were meeting all our regulatory obligations. According to Sarsfield, the Committee was to be headed up by Vice-Chairman Granholm who would be paid a monthly retainer of approximately $1,800. When Director Henning observed that it had always been his impression that compliance was the chief function of

Kent Glover and the primary justification for his employment, a rather heated exchange ensued. During this exchange, Directors Bray, Henning, Krug and Van Valer voiced their opinion that there appeared to be real problems in defining the roles of Sarsfield and Glover, that there were a questions about Glover's attendance, Sarsfield's consulting business, the bank's direction, and other critical problems that the Directors wanted to address in a special Directors meeting. It was also raised by Directors Henning and Bray that they believed that a "key man" policy should be taken out on Sarsfield since he effectively had become the bank; and, for this same reason, Director Bray felt that serious thought should be given to hiring a "full time professional banker" to back up Sarsfield. Sarsfield refused to respond to any of the Directors' statements and became visible angry and demanded that the only Board business was the approval of his Compliance Committee and hiring of Granholm. After several Directors made statements to the effect that they intended to look at the Committee after two months of operation, Director Van Valer stated that he would recommend approval of the Committee solely on the condition that Sarsfield agreed to meet with the Directors at a special meeting to be held within the next two weeks to respond to their collective concerns about the bank and the roles of Sarsfield and Glover. Sarsfield agreed and the Committee was approved and the meeting adjourned.

(4) Henning Lunch, June 28, 1991: At 11:30 a.m. on Friday June 28, 1991, Sarsfield left a telephone message with Henning's secretary that he and Glover were taking Henning to lunch at 12:00 and that he should expect to be ready. At 11:45 a.m., Director Bray phoned Henning that a commercial loan for $100,000 at First Interstate had been called that morning. When asked the reason for calling the loan, First Interstate had informed Bray that the market maker in SNB stock, a Philip Economopolous, had informed the bank that the stock had collapsed because Sarsfield had put out a bid for 11,000 shares at $4.25 when the stock had previously been trading at $6.00. Bray was quite upset about the matter and was of the opinion that Sarsfield had somehow breached his fiduciary duty to the stock holders by representing publicly that the stock had a par value of $10.00 while private attempting to deflate its value by bidding $4.25. Director Henning advised Bray that Sarsfield and Glover were meeting him for lunch and that he would bring up the matter.

On sitting down to lunch at approximately 12:15, Sarsfield went into a tirade about how there a cabal out to get him and destroy him and that Henning, as the bank's attorney, had failed to warn him and prevent what appeared to be an attack on his administration of the bank. Sarsfield went on to say that the Board had no right or reason to question his administration as long as the performance of the bank was positive. Sarsfield stated further that if the Board would be quiet, he could guarantee a $1 a share dividend by hears end. These remarks concluded with the question posed by Sarsfield to Henning as to whether he was going to be on Sarsfield and Glover's side against the "bad guys" or join the bad guys. When Henning replied that he felt he had a fiduciary duty to the Board and all its stockholders to determine the propriety of management's actions, Sarsfield replied that as SNB's attorney he owned his duty solely and only to the two major stockholders, viz., Sarsfield and Glover. Henning then proceeded to raise the questions regarding his consulting business and Glover's residence in Carmel, and particularly the question of leading the regulators to believe that Glover was the President of SNB when in fact Sarsfield had apparently always operated exclusively in this position while Glover resided in Carmel. Director Henning stated that he had a problem telling the regulators that they were hiring an individual, for instance, as a teller for approval of the OCC's certificate, and then later

transferring that individual to CEO. Henning observed that it could well be argued that they had been carrying on an elaborate masquerade for the past years and that Sarsfield was driving the bank without a license. Sarsfield advised Henning that it was none of his business what Kent and he did as long as the performance was good. Sarsfiled further volunteered that he paid his secretary at the bank, Katherine Long, $400-$500 a month to work on his consulting business, but no deduction was made from her salary from the bank.

When Henning addressed the recent complaint of Director Bray regarding the low stock price bid, Sarsfield replied that the bid was not for 11,000 shares but for 30,000 shares. Sarsfield then proposed that if Henning would consider himself one of the "good guys," he, Sarsfield, would procure for Henning an interest only loan to share in the purchase of the 30,000 shares. Henning desisted and specifically asked Glover whether the allegation concerning his residence inn Carmel and effective absence from the Bank were true; but, Glover merely looked down at his plate and said nothing whatsoever. Sarsfield then repeated that he and Kent were a team, that the Board could not have one without the other, that Occ could care less as long as the performance was good. When Henning stated that he felt the Board had a right to inquire into these matters, Sarsfield stated categorically that he would

never respond to the Board, that he felt he should only answer to "good guys." Sarsfield then demanded that Henning recount all meetings and statements from all employees and Directors that had occurred in the last month. When Henning stated that this was the very purpose of the special Board meeting that had been promised, Sarsfield then stated that he and Kent had concluded that he, Henning, had a conflict of interest and could no longer server as a Director. Sarsfield then produced a previously typed letter of resignation for Henning to sign with the advice that he (Sarsfield) and Glover were not leaving the lunch table until Henning had signed the document. Henning replied that he would give the matter due consideration after the special meeting, to which Sarsfield replied that there would never be such a meeting. Sarsfield then proceeded to indicate to Henning that the resignation was merely from the Board and that Sarsfield intended to continue Henning on as attorney for a retainer of $500 a month indefinitely as long as he walked away from this. At this juncture, Glover made the only statement during the entire one and a half hour lunch to the effect that their dispute with Henning would not affect the situation of his brother Tom as Assistant Vice-President. Sarsfield closed the lunch at approximately 1:50 p.m. with the statement that Henning's problems with the bank would case to exist after 3:00 p.m. and that he expected Henning to reconsider his decision and phone him before that time or

it would be all over for Henning.

(5) Henning Phone Call, June 28, 1991: Director Henning proceeded after his luncheon meeting to meet with Director Krug who had lunched that day with Director Bray. Henning reported the statements made by Sarsfield and Glover at lunch and Krug confirmed that Bray was quite troubled with the direction of the bank under Sarsfield and there apparently had been an ongoing breach of Sarsfield's fiduciary duty in the matter and that we had to get a real "pro" in to back up Sarsfield. It was also emphasized that Sarsfield's reaction indicated that there may be more amiss than was suspected. Krug advised Henning that Sarsfield and Glover had made an appointment to see him at 4:15 that afternoon. It was then agreed that Henning would phone Sarsfield from Krug's office and confirm that he had no intention of resigning as counsel or Director.

Henning called Sarsfield from Krug's office and confirmed to Sarsfield that he had no intention of changing his mind and advised Sarsfield that all these matters could be discussed at the special meeting. Sarsfield replied that he was now offering Henning his last chance to get on the side of the "good guys;" that Sarsfield wanted Henning to side with him and Kent Glover and accompany them to a

meeting with Director Krug and help get Krug in line. Henning stated that he would attend such a meeting if it would help, but that he had no intention of "strong-arming" Krug. Sarsfield then pursued a line of personal invective that went on for approximately twenty minutes during which he emphasized again his ability as Sampson to bring the bank down around him if the Board persisted in questioning him and stated that he was now "the resurrected Hitler" who had come back and was "no longer going to be the nice guy" with the Board. He further stated that he would thereafter run the bank as he unilaterally saw fit since there was no room for consensus nor did he seek to have same. On this note Sarsfield ended the telephone conversation.

(6) Krug Meeting, June 28, 1991: Director Krug met with Sarsfield and Glover at 4:15 p.m., June 28, 1991. As stated by Sarsfield to Krug, Director Bray had mounted a personal rebellion against his administration of the bank and was attempting to seduce the other Directors to follow him in " getting Sarsfield." Sarsfield informed Krug that he had learned that he and Bray had lunched together and demanded to know what had been discussed. Krug informed Sarsfield that he hoped to be a peacemaker in the process but that he and Bray and the others had invested over a half million dollars in the bank and were now concerned over its operation and that the Board had every

right to compel Sarsfield to attend a special meeting to discuss various allegations regarding his, Sarsfield's conduct. Sarsfield then stated that it was imperative to get Henning to walk away from this situation and informed Krug that he, Sarsfield, had offered Henning $500 a month to resign as a Director. The rest of the conversation degenerated into personal attacks on the various Directors who were out to get him, Sarsfield, and a closing remark that he would not meet with the Directors.

(7) Bray Phone Call, June 29, 1991: Sarsfield telephoned Director Bray at approximately 2:00 p.m. on Saturday, June 29, 1991. The call consisted of various rambling statements by Sarsfield that he was not going to let the Directors run the Bank and that everyone was out to get him. Sarsfield then proceeded to inform Bray that he believed that the continued employment of Bray's daughter, Florence Bray, might be viewed by him as a disservice to the bank if the Directors continued in their opposing ways to his, Sarsfield's administration of the bank.

(8) Henning Phone Call, June 30, 1991: Sarsfield telephoned Director Henning at 10:00 a.m., Sunday, June 29, 1991, and informed him that he was "fired" as both Director and counsel to the

bank and that he would have nothing to do with the bank thereafter. When Director Henning reminded Sarsfield that he had been elected by to stockholders and hired by vote of the Board, Sarsfield stated again that it was his bank and he would do what he wanted. Sarsfield then again reminded that he was willing to continue Henning as counsel for $500 a month if he would walk away. When Henning responded that he felt that would be a breach of his fiduciary duty to the stockholders, Sarsfield replied that he intended to put Henning's brother, Tom, on the phone Monday and have his brother Tom request his resignation for the good of the bank. On this note, Sarsfield terminated the call.

(9) Krug Phone Call, June 30, 1991: At approximately 10:30 a.m., Sunday, June 29, 1991, Sarsfield phoned Krug to report that Henning would not accept the deal. When Krug informed Sarsfield that it had every appearance of a bribe and a misappropriation of that position. Sarsfield then proceeded to ramble on about all his enemies; however, when interrupted by Krug who pressed for a date for a special Board meeting, Sarsfield relented and agreed that the Board would meet on July 9, 1991. This conversation was terminated and Krug telephoned Director Henning shortly thereafter and exchanged the substance of their respective conversations with Sarsfield. Both concluded that Sarsfield's behavior was raising serious questions

regarding his capacity to continue running the bank.

(10) Sarsfield's Actions, July 1, 1991: At approximately 2:00 p.m. on July 1, 1991, Sarsfield call Tom Henning, Director Henning's brother, into his office and in the presence of Kent Glover advised Henning that they were having a serious problem with his brother, Director Henning, and that they were intent on resolving the problem in their favor. They informed him the meeting was only for the purpose of making this statement and that he could return to his duties. Later that day, Sarsfield orally instructed Rose Pobleti, SNB's cashier, in the presence of a number of SNb employees, that she was not to pay Director Henning his monthly Director/Counsel fee. Each of SNB's Directors are paid $250 for each monthly meeting; and Henning is paid an additional $250 as SNB counsel.

3. Possible Statutory Violations: The foregoing allegations if proved true could conceivably support the following statutory and regulatory violations:

(1) Employment Discrimination: Employment of Matthew Sarsfield on better terms vice a similarly situated female employee, Yvonne Petrunin, constitutes a possible violation of Title VII of the 1964 Civil Rights Act, 42 USC § 2000 e-2. It also possibly constitutes a breach of Sarsfield's fiduciary duty (BFD).

(2) Misleading Statements: Statements submitted by Sarsfield and Glover to OCC respecting executive duties individuals who would hold offices of President and Chairman of the Board could possibly be viewed as "misrepresentations" for purposes of 12 CFR 5.20 (2)(ii), (4), (11), and result in a revocation of SNB's charter and criminal penalties under 18 USC §1001.

(3) Wasting of Corporate Assets: The Glover-Carmel arrangement and the inordinate conduct of Sarsfield's consulting business could possibly be viewed as a wasting or gift of SNB's assets, which view could also be applied to the hiring of Granholm in connection with the Compliance Committee. International Bank v.

Bennet, 513 So.2d 1294 (Fla. App. 1987) [payment for unrendered services].

(4) Conversion of Corporate Opportunity: Sarsfield's various consulting services amounted apparently to a personal income in excess of $1M over the last five years. This income arguably came excess of $1M over the last five years. This income arguably came to him solely because of his status as Chairman/President of SNB and solely by virtue of his use of his employment time (estimated to be 2000 hours per year) while employed by SNB. Accordingly, since a bank officer has a fiduciary duty to make certain that all the economic reward flowing from the corporate opportunities made available to him as an officer of SNB inure equally to all other owners of the bank, it could arguably be said that Sarsfield has a fiduciary obligation to restore his consulting income to the bank as its rightful asset. Garner v. Pearson, 545 F.Supp 549 (MD Fla. 1982); First National Bank v. Smith, 436 F.Supp 824 (SD Tex 1977), affd in part, vacated in part, 610 F.2d 1258 (5th Cir. 1980.

(5) Circumvention of Board of Directors: Sarsfield's actions circumventing SNB's Board and proceeding to administer the bank without consultation with the Board, under a threat to pull the bank

down around him if challenged, is arguably in possible violation of the policy intendments underlying 12 USC § 71.

(6) Failure to Maintain Capital Ratio Requirements: Sarsfield's failure to develop core deposits or recapitalize SNB, in light of its perceived liquidity problems, and reliance solely on the banks equity line with the FHLB, could arguably create a violation of the capital ratio requirements of 12 CFR 3.10(e)..

(7) Stock Manipulation: Sarsfield's possible attempts to drive the price of the stock down to increase his holdings in the bank, could arguably constitute a BFD. His additional offer to procure a no interest loan for Director Henning to participate with Sarsfield in such a purchase, if implemented, could possibly support a violation of 12 USC §375(a) [cannot extend credit in any manner] as a preferential loan.

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OCC EXHIBIT 157

IN RE SEQUOIA NATIONAL BANK

Declaration of John F. Henning, Jr.

I, John F. Henning, Jr., hereby declare under penalty of perjury pursuant to the laws of the United States that:

1. I am a Director of the Sequoia National Bank located at 165 Post Street, San Francisco, California, 94104; and, since the founding of the bank through July 29, 1991, served as Counsel to the bank, for a retainer of $500.00 a month in lieu of a Director's fee of $250.00 a month. I make this Declaration based upon my personal knowledge of the events set forth herein except as to those matters declared upon information and belief which I believe to be true.

2. This Declaration is submitted in connection with that letter to October 4, 1991, addressed to the Board of Directors of Sequoia National Bank by Richard Silver, Esq., Attorney for the Comptroller of the Currency respecting the issue of possible retaliatory treatment against Ms. Beverly Williams, the bank's Vice-President and Cashier, a copy of which letter is attached hereto as Exhibit A.

3. The events and conversations pertinent to this issue began on June 28, 1991. On that date I received a telephone call from William S. Sarsfield at approximately 11:40 a.m. requesting me to have lunch with him and Kent Glover at the Commercial Club. They said it was an emergency situation that required my attention and that they would be at my office at 12:00 noon. They so arrived and we went directly to the Commercial Club.

4. I was not informed of the subject of the meeting until we had sat down, at which time Mr. Sarsfield advised me that I had failed as Counsel to the bank because I had not kept him apprised of dissension on the Board of Directors with the way he was handling matters. He asked me to spell out the problems the Board had with his administration of the bank's affairs. I informed him of the matters that were of concern to the Board. A report of the discussions had at this luncheon meeting is attached hereto and incorporated herein as Exhibit A. At approximately 2:30 p.m., after discussing the aforementioned problems, Mr. Sarsfield submitted a pre-typed resignation form to me as a Director of Sequoia National Bank with the admonition that he was not asking me to resign as Counsel for the bank, but to just get off the Board and he would pay my retainer indefinitely. I refused to resign and advised him that I took his offer to remain as Counsel as an attempt to bribe me to go away.

5. Thereafter, on July 5, 1991, at approximately 1:30 p.m., I had occasion to meet with Mr. Sarsfield with respect to the topics discussed at our luncheon meeting of June 28, 1991, two of which subjects involved the filing of the bank's call reports and the issue of sex discrimination regarding the payment of higher wages to his son Matthew Sarsfield vis-a-vis a more senior female teller, Yvonne Petrunin. I had previously advised Mr. Sarsfield that I had been informed that the employees had complained about his preferential treatment of his son only to be told by him that their dissatisfaction rested in the fact that their "last names were not the same as the bank's president." When I brought these matters to Mr. Sarsfield's attention again, he advised me that the only possible source of information regarding these complaints regarding discrimination and the preparation of the call reports was Beverly Williams; and, he stated that: "Beverly Williams is going to have to go." I made no reply to Mr. Sarsfield about the source of my information.

6. I was subsequently informed by Rory O'Flaherty that about this first week of July 1991, he overheard Mr. Sarsfield accuse Beverly Williams of insinuating a "computer virus" into the bank's software system. It was also in this first week of July that pursuant to a prior arrangement among Messrs. William Sarsfield, Kent Glover, Phil Bray, Norman Krug, Richard Van Valer, and myself, that we agreed to hold a Directors' meeting at the Commercial Club for a working lunch to discuss the issues identified as posing problems for the Directors. These problems were the subject of a Memorandum dated July 9, 1991, a copy of which attached hereto and incorporated herein as Exhibit C. This Memorandum had been previously hand delivered to Mr. Sarsfield at approximately 9:15 a.m. that morning prior to the meeting.

7. This meeting took place in a private meeting room at the Commercial Club. The parties arrived there at approximately 12:30 a.m. As the parties moved into the room to take their seats around the conference table, Mr. Sarsfield announced that there was "a critical problem that the Board had to deal with regarding Beverly Williams." He then stated that: "Beverly Willaims has control of all the liquid assets of the bank. She is in a position to do great harm to the bank; and, I and Kent are afraid that she can destroy the bank. We have to dismiss here immediately." Mr. Sarsfield's demeanor at this time was one of great agitation.

8. The Board's initial reaction to this statement was one of surprise with several responsive comments along the line of: "What's the problem, I thought whe was our best employee?" Mr. Sarsfield then stated that: "She has put a virus into the computer. She's put a virus into the system which will ruin the bank." This later statement perplexed many of the Directors as they asked what a virus was and what he was talking about. I then, in a forceful manner, asked him what evidence he had that Beverly Williams had done anything of the kind. Mr. Sarsfield made no reply other than to state that: "Well, she is in a position to do us great harm. She could put a virus into the system."

9. After we finished discussing the second point of the July 9, 1991, Memorandum regarding Mr. Sarsfield's son, Matthew, Mr. Sarsfield pointedly stated to me that: "Beverly is telling you all these things. She's the source of all this information, isn't she? She has to go. She has to go, don't you see." This outburst was ignored by the Directors at first. However, during each of the subsequent discussions on the various points raised in the Memorandum, Mr. Sarsfield repeated this accusation.

10. At approximately, 3:30 p.m., after the third or fourth outburst of this nature, I specifically placed a xerox copy of 12 USC §1831 before him on the table and said: "I will not stand for any retaliatory action against Beverly Williams or any other employee of Sequoia National Bank for supplying the Board with information regarding the bank's operations. Your statements raise serious implications of a violation of FIRREA; and, if it comes to a civil suit, I will be sitting in the witness chair to testify to your statements." This statement was made in a strong voice with the above-named Directors in attendance.

11. After making this statement, Kent Glover asked: "Whose side are you on anyway?" I replied that I was on the side of the law and the shareholders. Mr. Glover then responded that: "That's why we're going to have to get other counsel."

12. At a special meeting called for July 29, 1991, held on the premises of the law firm of Payne, Thompson Walker and Taaffee, located at 235 Montghomery Street, Suite 760, San Francisco, Mr. Sarsfield asked for and received my resignation as Counsel for the Bank.

13. On August 28, 1991, at the end of a regularly scheduled meeting of the Board of Directors, which was held in Suite 760 at 235 Montgomery Street, at approximately 4:30 p.m., I had occasion to exit

the meeting with Mr. Kent Glover. We were conversing over my general concern for the welfare for Beverly Williams; and, I stated that I thought Mr. Sarsfield's allegations regarding the insinuation of a virus into the software system by Beverly Williams was way off base. Mr. Glover replied to me that: "Bill's statements were admittedly a little crazy about that."

13. On September 25, 1991, at a regularly scheduled meeting of the Board of Directors held in Suite 760 at 235 Montgomery Street, to meet with various representatives of the Office of the Comptroller General (OCC), a recess was called after the OCC representatives had left the premises. The time was approximately 1:30 p.m. I was standing in the public hallway adjacent to the entry door to Suite 760 when I was approached by Mr. Sarsfield. He stated the following to me: "Please tell me who in the bank is talking with the Regulators. Give me their names. I promise there will be no retaliation if you just give me their names. I promise you that no one will be disciplined." I replied with the statement: "I don't know." Mr. Sarsfield then replied immediately: "Beverly has got to go. She has to go tomorrow."

14. At the time Mr. Sarsfield made this statement, Director Tom Niedermeyer was approaching us. I then stated to Mr. Sarsfield: "Bill will you repeat what you just said to me?"

Mr. Sarsfield said: "I take it back. I take it back."

15. On October 8, 1991, the date of this Declaration, I attended a meeting with the OCC at their offices at 50 Fremont Street, San Francisco. In attendance at that meeting besids the OCC representatives were myself, William Sarsfield, Kent Glover, and Edward Mevi, Esq. At the conclusion of the meeting, at approximately, 12:20 p.m., the aforementioned individuals were gathered on the corner of First and Market Streets discussing the ramifications and subject matter of our meeting with the OCC. During this discussion, Mr. Kent

Glover made the comment: "the real problem we have is all these people talking to the OCC. We can't control it." Mr. Sarsfield then interjected by addressing a question to me: "Well, tell me who's talking to them." I responded: "You shouldn't be asking me questions like that after getting the OCC"s letter, particularly in front of counsel. That's a crazy question to be asking me." Mr. Sarsfield dropped the subject.

Executed at San Francisco, California, on October 8, 1991.

/s/ John F. Henning, Jr.

OCC EXHIBIT 8 (p. 1 only)

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF SEQUOIA NATIONAL BANK
SAN FRANCISCO, CALIFORNIA

Consent Order

The Comptroller of the Currency of the United States of America (COMPTROLLER), through his National Bank Examiner, has examined the Sequoia National Bank, San Francisco, California (BANK), and his findings are contained in the Report of Examination, dated July 31, 1991 (ROE).

The BANK, by and through its duly elected and acting Board of Directors (BOARD), has executed a "Stipulation and Consent to the Issuance of a Consent Order," dated March 4, 1992, which is accepted by the COMPTROLLER. By this Stipulation and Consent, which is incorporated herein by reference the same as if fully set forth, the BANK has consented to the issuance of this Consent Order (ORDER) by the COMPTROLLER.

OCC EXHIBIT 160

November 18, 1992

MEMO TO FILE - SEQUOIA NATIONAL BANK

(Certif. No. 26907; Bank No. 061486; Charter No. 21337)

Re: Norman Krug Loans

P. Bolles has procured a descrambler program to read W. Sarsfield's coded computer disks. This process is being conducted in Las Vegas. The first item of interest is reflected by the correspondence of January 15, 1992, from Sarsfield to Paul Weiss forwarding a cashier's check for $70,000.00 to cover the City taxes on the Hotel California. There is no apparent paper track on this or indication where the funds came from. Bolles is checking. Enclosure One. Bolles also claims that he has a "suspicion" that funds may have been laudered through a loan to Steve Vida. Vida was a former officer of the World Trade Bank through which Krug obtained financing for his hotel enterprises. Bolles apparently suspects that the proceeds of the Vida loan were shared with Krug. The Vida oan is three months past due and the loan to value ratio was 104%. Enclosure (2). Bolles and Puccinelli report that the preliminary findings of the Lillick investigation are that Sarsfield, Krug and Glover have violated the loan limits etc. regarding the Krug Loan.

Written recommendations apparently have been prepared, amended, and circulated to the effect that the Board has the obligation to refer this matter to the OCC at the risk of personal liability according to Bolles. Sarsfield has launched a telephone campaign to all concerned to ameliorate the report. Lillick also notes that Sarsfield and Krug refused to cooperate or provide any information in the course of their investigation; and, for this reason, Lillick is recommending that Sarsfield, Glover, and Krug step aside as directors for their failure to co-operate. Bolles is unsure whether this notation will be contained in the final report. Bolles is of the opinion that when the matte comes to a vote, Sarsfield, Krug, Glover and Granholm will have to disqualify themselves in the matter, which would leave the determination of further action to Directors Henning, Bolles, Puccinelli, Van Valer and Bray. In apparent anticipation of an adverse finding and recommendation, Puccinelli has advised all that he cannot recommend any Directors' slate that would include Directors Sarsfield, Krug or Glover. By the same token, it is reported through Granholm that Sarsfield has already prepared a notice of the shareholders' meeting and a Sarsfield slate which will exclude the "troublemakers" who don't have the votes to save themselves. Granholm did not identify the "troublemakers."

OCC EXHIBIT 156

JOHN F. HENNING, JR.
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SAN FRANCISCO, CA 94104
TEL: 415-981-4400
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CONFIDENTIAL COMMUNICATION TO
OCC ADDRESSEES

March 25, 1993

Ms. Joanne A. Hyder
National Bank Examiner
Specialty Supervision Division
Comptroller of the Currency
Washington, D.C. 20219

Re: Correspondence of March 20, 1993,
P. M. Collins-Lancaster, Sequoia
National Bank; Charter No. 21337

Dear Ms. Hyder:

I am in receipt of Ms. Collins-Lancaster's correspondence of March 20, 1993, with respect to the authority of the Compliance Committee under Article I(4) of the Consent Order executed by the Board on March 9, 1993, and those actions reported by the Minutes of the Compliance Committee dated March 18, 1993. Such minutes as were forwarded to you are correct and accurate.

However, I have been reliably informed that Ms. Collins-Lancaster has orally reported to you that at the Meeting of the Board of Directors on March 19, 1993, I advised the Board that it was the intention of the Compliance Committee to rehire those seven employees recently dismissed by Ms. Collins-Lancaster on March 12, 1993. Such a representation is completely false as can be confirmed by making due inquiry of any Board member in attendance. I have never made a statement of that kind at any time; nor, is it my intention to recommend that the Committee rehire said employees. As the Minutes of the Compliance Committee of February 26 and 27, 1993, attest, it was the recommendation of the Compliance Committee that such terminations be effected immediately.[1]

Such actions as are outlined in the Committee's Minutes of March 18, 1993, were considered by the Committee in the face of a serious erosion of the Bank's financial position and a concern for the absence of effective management over the last three weeks.

[1] All references to the Minutes or Reports of the Compliance Committee assume that you have been copied or forwarded all such documents that have been required and submitted by the Compliance Committee and/or the Bank under the terms of the Consent Order.

It has become apparent that much of the executive functions that the Committee assumed would be undertaken by Ms. Collins-Lancaster were delegated to consultants of her hiring. These items included, inter alia, the preparation of the proxy statement, preparation of various business plan scenarios, and the initial drafting of the Bank's Response to the Report of Examination of June 30, 1992. Putting aside the adequacy of the consultants' workproduct, these hirings added an estimated additional dollar cost to the Bank of $11,000.00 in the month of February alone; and it is quite clear that this continued delegation to hired consultants in all phases of the Bank's operations is a trend that will continue.

It also became apparent to the Compliance Committee that the majority control on the Board in the persons of Directors Sarsfield, Glover, Granholm, Bray and Krug, (hereinafter the "Majority"), has no intention of allowing the Compliance Committee to continue to fulfill its tasked functions under the Consent Order. This position was made clear by the statements of Ms. Collins-Lancaster and Board Chairman Victor Granholm to me on March 17, 1993, that henceforth the Bank would not honor any contractual obligations of the Compliance Committee and the Committee was no longer authorized, in their opinion, to engage the services of, or consult with, third parties.

The work of the Compliance Committee is viewed as a threat to the Majority's financial and interrelated interests, which fact was

well illustrated in their prior actions with respect to the "renewal" of the Sarsfield loan. Attached for your review is the Agenda for the March 1, 1993, Board of Directors Meeting in which former Chairman of the Board and Compliance Committee member Peter Bolles had set the items of "Director Loans - William C. Sarsfield" and the "Consent Order - Report of Examination. Agenda (3/1/93), Enclosure 1.

After discussion of the Business Plan was terminated, which discussion was conducted in executive session at the request of Directors Krug and Sarsfield, and before any discussion could be raised regarding Mr. Sarsfield's loan, Director Krug moved that the meeting be adjourned two days to the Organizational Meeting following the Shareholders' Meeting of March 3, 1993, for consideration of the remaining agenda by the "new" Board. This motion was successfully supported by the afore-referenced Majority. When I requested a copy of the Minutes of this meeting from Bank Secretary Kathy Long on March 22, 1993, I was informed that the Meeting was had in "executive session" and no Minutes were available.[2]

[2] The Bank's inability to maintain correct and reliable minutes has been historically cited to the Bank and is referenced in the June 30, 1992, Report of Examination. This situation had been remedied, as acknowledged by the OCC, by the appointment of Mr. Bolles as Corporate Secretary charged with maintaining the minutes. Mr. Bolles

The facts and circumstances of Mr. Sarsfield's loan can be confirmed by Ms. Stephanie Peters of the OCC/SF. Put succinctly, former President and CEO Sarsfield received an Equity Line loan of some $390,000.00 on August 20, 1987, with a five year term. Under the terms and conditions of that loan, Mr. Sarsfield had the option of meeting one of three monthly payment schedules, to wit: "...1 ½% of the remaining balance, $500.00 or the amortized monthly interest, whichever is the greater..." As confirmed by Ms. Collins-Lancaster upon my inquiry, Mr. Sarsfield had paid the least of these options, viz., the monthly accrued interest. The loan was due for renewal on August 20, 1992, and was put on the agenda for the August 24, 1992 Meeting of the Board of Directors.

On that date, the matter was called and a vote of less than a majority of the full Board voted to extend the loan. The vote of Director Niedermeyer was telephoned in after the meeting and a vote of one other Director was faxed in. In reviewing the loan in January 1993, the OCC instructed Ms. Collins-Lancaster to bring the Sarsfield loan back to the Board for review and approval by a majority of the total Board since it appeared to the OCC that a Regulation O violation had occurred in connection with the extension of the loan. Notwithstanding, Management did not bring the matter back for Board review, despite the insistence of former

past involvement in this regard was the primary reason for the Compliance Committee's action in hiring him for this purpose.

Chairman/Director Peter Bolles, until the March 1, 1992, Board Meeting.

On March 3, 1993, as a matter of the Agenda of the Organizational Meeting following the Shareholders' Meeting of that date, the continued agenda of Mr. Sarsfield's loan was addressed by former Director Charles Puccinelli. After observing that Mr. Sarsfield's assets were insufficient to support a renewal of the loan, Mr. Puccinelli put the direct question to Ms. Collins-Lancaster as to whether in her judgment the loan should be renewed on such an asset record. She answered in the negative. With Mr. Sarsfield absenting himself, the vote was called. Members Glover and Krug abstained; and I and Directors Puccinelli, Bray and Van Valer voted against the renewal of the note.

Subsequent thereto, Mr. Sarsfield took the position that since the Board had failed to vote against the renewal of his note within thirty days of its August 20, 1992, due date, it was automatically renewed, irrespective of the OCC's instructions to revisit the loan. When I brought this matter to the attention of Ms. Collins-Lancaster and asked her what steps she planned to take to call the note, she responded that she was taking no action until so instructed by an attorney. When I asked Director Glover what the procedures were for calling the note, he stated that the loan document was illegible regarding same. When I again asked for a copy of the Minutes of the March 3, 1993, Meeting, I was similarly advised by Ms. Long that there were no Minutes taken because it involved an "executive

session."

I am reliably informed as of this writing that, at the instruction of Mr. Sarsfield, Ms. Collins-Lancaster, despite the vote of the Board of Directors on March 3, 1993, against extending the note, made a notation in the loan file that Mr. Sarsfield's note has been extended for a three year period through August 1, 1995. The balance on the note as of this date is $389,937.54. No further action has been taken by Management to call Mr. Sarsfield's note nor secure and/or correct the payment schedule under the note whereby he met the least of the payment options.

This episode regarding Mr. Sarsfield's loan is all too typical of the approach by Bank Management to insider transactions and other items that have prevailed at Sequoia National Bank since its inception. The fact that a related loan to Director Krug has been charged off, over the objection of Director Sarsfield, by the Bank; and, two loans to Director Bray have been graded substandard by the OCC, should confirm the dearth of adequate Board and Management supervision of insider transactions.

It also should not come as a surprise, in light of Management's defiantly unauthorized extension of the Sarsfield loan, that at the opening of the Board of Directors' Meeting of March 19, 1993, Director Sarsfield announced that the Bank was submitting a "914" for Ms. Collins-Lancaster's approval as the Bank's CEO "...in light of her outstanding service to the Bank during her interim appointment."

The space of this letter is insufficient to catalogue the extensive pattern and practice of the Bank's misdeeds and defalcations. It is, however, critical to your understanding of the situation, and the necessary role of the Compliance Committee, to comprehend in some fashion how the Bank has operated during the last twelve months since the imposition of the Consent Order on March 9, 1992. To this end, I am enclosing for your review the Compliance Committee's "Response to: The June 30, 1992 Report of Examination." Response (3/1/93), Enclosure 2. This Report was prepared by the Compliance Committee under the direction of former Chairman/Director Peter Bolles upon the instruction of Ms. Collins-Lancaster by her Memo of February 26, 1992. The Response has been highlighted to emphasize those aspects of Management's continuing delinquency in meeting regulatory requirements.

By the Minutes of its March 18, 1993, Meeting, it is the intention of the Compliance Committee to reassert its authority under the Consent Order in terms of its oversight functions for the hiring of consultants and other "outside services" to the Bank as prescribed by Article I(4) of the Consent Order. This assertion is in keeping with the unbroken practice under which the Compliance Committee has operated since entry of the Consent Order. As can be confirmed by OCC/SF representatives D. Pearson, K. Grace, S. Peters, R. Tornborg, and R. Sanders, the Compliance Committee has kept the OCC apprised of all actions taken by the Committee; and, the Committee has been in constant consultation with the OCC with respect to the exercise of its authority under the Consent Order.

Indeed, consistent with Article I(4) of the Consent Order, the Compliance Committee engaged the Alford Group to conduct an executive search and make such recommendations as it deemed appropriate for filling the positions of CEO, SLO, and Cashier following severe criticism by the OCC of the Majority's "914" Application for President/CEO candidate, Paul Van Etten, which was vetoed by the OCC. It was also the Compliance Committee that retained the Catalano Consulting Group (Liquidity and Volatile Funds Management), JRC Associates (Independent Loan Review and ALLL Methodology), and independent Attorney Douglas N. Akay (Possible Violations of Law and Corrections).

And, in continuous consultation with the OCC, it was the Compliance Committee that recommended to the Board that Ms. Collins-Lancaster be engaged on a thirty day contract to fill the Interim President/CEO position (Article II) previously held by Director Granholm. The Committee also recommended that the Board engage Ms. Kathryn A. Stiles to fill the full-time position of Vice President, Controller/Cashier.

In exercising its authority and fulfilling its stated obligations under the Consent Order, the Compliance Committee has at all times complied with, and positively responded to, all directions of the OCC. As so counseled by the OCC, the Committee was successful in:

- disqualifying all Directors with defaulted or substandard loans from sitting on Bank Committees;

- securing in August 1992 the resignation of Director Kent Glover as the Bank's President (Article II);

- securing in January 1993 the resignation of William Sarsfield as the Bank's Chairman of the Board and CEO and in August 1992 allegedly excluding Director Sarsfield from further participation from management in the daily operations of the Bank (Article II);[3]

- procuring the filing of a Criminal Referral with respect to Regulation O violations pertaining to the related loans of Director Krug (Article XVII);

[3] I am reliably informed that since March 3, 1993, Mr. Sarsfield has been spending between two to four hours on a daily basis on the Bank's premises in consultation with Ms. Collins-Lancaster or otherwise apparently involved in the business of the Bank. In this regard, he has issued numerous hand written memoranda regarding items that he wants pursued or addressed by Ms. Collins-Lancaster. All of the foregoing is contrary to the OCC's admonition and understanding that Mr. Sarsfield would withdraw from the daily managment of the Bank. Perhaps it should be noted in this regard that Mr. Sarsfield merely relocated his offices to the fifth floor of the building while continuing to receive his mail and telephone messages through the Bank. While the Bank's telephone number is 415-781-0600, Mr. Sarsfield established his new telephone number as 415-781-0601. So much for his withdrawal from the affairs of the Bank.

- requesting (unsuccessfully) the resignations of Directors of Sarsfield, Krug and Bray from the Board;

- following the interim appointment of Ms. Collins-Lancaster, the Committee pursued, at the insistence of the OCC, and as a condition of the interim appointment, the candidacy of recommended nominations of senior executive officer positions, e.g., Mr. Owen J. Erickson (accepted another position); Mr. Samuel S. Mosunic (the candidate of the Compliance Committee), and Mr. Gordon Taubenheim (declined to serve in a bank controlled by Director Sarsfield) as candidates for President/CEO (Article II); Mr. Robert Mitchell, Mr. Peter Richmond and Mr. Randall A. Shell, as candidates for Senior Lending Officer (Article III).

All of the foregoing actions and all other matters undertaken by the Compliance Committee during its tenure have been recorded and reported upon in compliance with the Consent Order. Such reports and documentation now involve an eight foot swath of black bindered reports available for inspection in the Bank's Board of Directors Conference Room. This documentation has been prepared largely without staff assistance by the Bank; and, since January 6, 1993, without compensation to the Compliance Committee. The preparation of such reports, as illustrated by our enclosed Response to Report of Examination, exacts a tremendous effort in time and

energy by the members of the Compliance Committee who, in my opinion, have demonstrated a remarkable dedication to this process with no identifiable earthly reward save their own sense of fulfilling their fiduciary duty to the Bank's shareholders.

The Compliance Committee is not vested with the power of moral persuasion. Its power to effect change and secure compliance with the provisions of the Consent Order abide solely in its powers under Article I(4) over the Bank's securing of "outside services." While the Bank's Management would take issue with vesting the Compliance Committee with what it views as its "executive" functions in hiring personnel, it should be noted that the Consent Order does not pertain to hiring permanent staff.

More importantly, it should be pointed out that whatever the potential for abuse by the Compliance Committee, the Compliance Committee is answerable to the OCC as the first line of responsibility under Article I of the Consent Order; and, the record of regulatory abuse by the Majority Directors, most of whom are disqualified from serving on the Compliance Committee by Board Resolution and the terms of Article I, is manifest.[4] Consultants and counsel to the

[4] That the Bank should come to such a state is somewhat paradoxical in light of the "qualifications" of the Bank's chief officers and primary regulatory interface with the OCC in the persons of former Chairman of the Board and CEO, William C. Sarsfield, and former

Majority inevitably opine in accord with the dictates of the Majority, in one instance going so far as to assert that the National Banking Act contained no provision mandating an annual Shareholders' Meeting (Confirm: R. Silver, Esq., OCC/SF). See also: Footnote 5, infra.

Moreover, preservation of the continuing role of the Compliance Committee is essential to the maintenance of credible financial reports. With the resignation of the Bank's Cashier, Ms. Kathy Stiles, the credibility and reliability of the Bank's financial reporting is suspect, in my opinion, as the Bank has admittedly a shortfall in qualified personnel for recording and reporting operational transactions, much less implementing management information systems and preparing Board reports. The circumstances of Ms. Stiles' resignation, the details of which are known to Messrs. Grace and Tornborg, should be sufficient reason

President Kent Glover. Immediately prior to his association with Sequoia Savings/National Bank, Mr. Glover previously served as the Regional Administrator of National Banks for the Fourteenth Region of the OCC (SF), and prior thereto as Regional Administrator of National Banks for the Twelfth Region (Denver), with prior assignments as Deputy Regional Administrator of Banks and a National Bank Examiner. Mr. Glover spent over thirty years in the service of the OCC. Mr. Sarsfield also enjoys alumni status with the OCC. Mr. Sarsfield served as a National Bank Examiner with the OCC from 1963 to 1968.

to preserve the independence and functions of the Compliance Committee in order to assure the Bank's compliance with the financial reporting requirements of the Consent Order.

The Bank is in a critical situation where its continued viability as a financial institution is at stake. The capital of the institution diminishes by the day without intervention by Management. In fact, I question whether the Bank in the last thirty days has met the threshold of Tier I and II assets outlined in Article XV of the Consent decree, a question which cannot be answered with any decree of assurance under the current circumstances of financial reporting.[5]

[5] On March 3, 1993, Mr. Sarsfield distributed a "Preliminary Draft" from our Independent Auditors, Grant Thorton. The Report had been drafted by Mr. Kunio Yoshioka under the date of February 12, 1993. Preliminary Draft, Enclosure 3. Without explaining why the Report had not been given to the Compliance Committee or the other Directors, Mr. Sarsfield went on to say that it was essential that Mr. Yoshioka's Report be amended since its adoption would be fatal to the prospects of a successful sale of the Bank. Mr. Sarsfield stated that Mr. Yoshioka was amenable to changing his Report if the Business Plan presented an improved forecast for the Bank. When I asked the Chairman of the Board, Mr. Victor Granholm, and Ms. Lancaster-Collins to invite Mr. Yoshioka to the next meeting of the Board of Directors so that the Compliance Committee and the full Board could discuss the matter fully with him, my request was totally ignored. Mr. Yoshioka's

And, no discernible effort is being made to address our capital needs. Notwithstanding, the vote of the Board to sell off $6-$8 million in loans at its August 24, 1993, Meeting, in order to meet the Tier II requirements by shrinking the Bank's assets, no effective action has been taken to achieve this. No effort has been made to recapitalize the Bank as has been so forcefully urged by the OCC. Indeed, Director Sarsfield has repeatedly stated that the Board must resist any recapitalization that would dilute the Directors' stock.

All current efforts by the Majority have been directed to selling the Bank to various groups of shadowed credibility and questioned finances, presenting the OCC at most with the prospect of substituting one under-capitalized group for another. There is no operative Business Plan in effect. The Bank's plan, to this observer and Director, is to keep the regulatory agencies at bay until a buyer is found, avoiding at all costs any recapitalization requirements.

Report states that the cited circumstances pertaining to the Bank's operations "raise substantial doubt about the Bank's ability to continue as a going concern." The fact that Mr. Yoshioka, according to Mr. Sarsfield, is willing to negotiate the terms of his year-end audit of the Bank's 1992 performance based on prospective changes is incomprehensible, to this Director, from the standpoint of accounting standards. It is also one more reason why the Consent Order vested the Compliance Committee with the responsibility of hiring "outside services" for the Bank if there is to be any sense of integrity in the Bank's processes.

In the final analysis, the future of this bank is determinable solely by the OCC. Irrespective of the oft-claimed regulatory or statutory limitations that pertain to the involvement of the OCC in the affairs of the Bank, whether by omission or commission, the OCC has installed itself as the major player in the shaping of the Bank's direction and future. We have recently observed the salutary effects of measured intervention by the OCC in the strikingly similar case of Barbary Coast here in San Francisco, resulting in the removal of certain Directors and the imposition of Civil Money Penalties. The result is that Barbary Coast has turned around and appears on the road to financial rejuvenation. Should not Sequoia National Bank be given the same opportunity for recovery? Are the interests of our shareholders any less elligible for your consideration?

If it is the desire of the OCC that the Bank successfully merge or effect a sale to a larger and more sufficiently capitalized institution, how does the continued operational and financial disintegration of the Bank, with the prospect of attendant litigation, attract a responsible purchaser? What purpose does the OCC's indulgence of this course of action serve?

Alternatively, if recapitalization is truly desired on the part of the OCC, how does the continuing diminution of the Bank's capital below the mandated Tier I and II levels of the Consent Order serve any purpose? Would not a recapitalization order by the OCC or the FDIC best serve the interests of the shareholders, depositors,

and the public alike in ensuring the financial vitality of the Bank? Would not the issuance of such an order focus the attention of the Majority on the only practical solution to our present situation?[6]

[6] The Compliance Committee is aware of the potential for the infusion of $3 million in capital from a group led by Mr. Samuel Mosunic of Liberty Bank, which fact has been communicated to the Board and Mr. Grace, OCC/SF. However, the Majority has resisted all efforts to meet with or review Mr. Mosunic's proposal.

APPENDIX C

STATUTORY PROVISIONS

12 USC § 1818(b) Cease and desist proceedings

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution- affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution- affiliated party. Such hearing shall be fixed for a date not earlier than thirty days

nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. § 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. § 601 et seq.], in the same manner as they apply to a State member insured depository institution. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under paragraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841].

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) Affirmative action to correct conditions resulting from violations or practices

The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to--

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if--

(I) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) Authority to limit activities

The authority to issue an order under this subsection or subsection (c) of this section includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) Unsatisfactory asset quality, management, earnings, or liquidity as unsafe or unsound practice

If an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for purposes of this subsection.

(9) Expansion of authority to savings and loan affiliates and entities

Subsections (a) through (s) and subsection (u) of this section shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, to any service corporation of a savings association and to any subsidiary of such service corporation, whether wholly or partly owned, in the same manner as such subsections apply to a savings association.

(10) Standard for certain orders

No authority under this subsection or subsection (c) of this section to prohibit any institution-affiliated party from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property may be exercised unless the appropriate Federal banking agency meets the standards of Rule 65 of the Federal Rules of Civil Procedure, without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and incomplete

12 USC § 1818(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party

afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h) of this section. Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution- affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for

the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.
(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

12 USC § 1818(i) Jurisdiction and enforcement; penalty
(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831o or 1831p-1 of this title, and such courts

shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) Civil money penalty

(A) First tier

Any insured depository institution which, and any institution-affiliated party who--

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section or any final order under section 1831o or 1831p-1 of this title;

(iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(iv) violates any written agreement between such depository institution and such agency, shall forfeit and pay a civil penalty of

not more than $5,000 for each day during which such violation continues.

(B) Second tier

Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who--

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party, shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution affiliated party who--

(i) knowingly--

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach, shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (c)

The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is--

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of--

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment

(i) Written notice

Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment

If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty

Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors

In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to--

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing

The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a request for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection

(i) Referral

If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable

In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) Disbursement

All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) Regulations

Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) Notice under this section after separation from service

The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(4) Prejudgment attachment

(A) In general

In any action brought by an appropriate Federal banking agency (excluding the Corporation when acting in a manner described in section 1821(d)(18) of this title) pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that --

(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

(ii) appoints a temporary receiver to administer the restraining order.

(B) Standard

(i) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under subparagraph (A) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(ii) State Proceeding

If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to a party's right to due process as Rule 65 (as modified with respect to such proceeding by clause (i)), the relief sought under subparagraph (A) may be requested under the laws of such State.